WIRETAPPING FOR NATIONAL SECURITY

HEARINGS

BEFORE

SUBCOMMITTEE NO. 3

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

EIGHTY-THIRD CONGRESS

FIRST SESSION

ON

H. R. 408

TO REGULATE THE INTERCEPTION OF COMMUNICATIONS IN THE INTEREST OF NATIONAL SECURITY AND THE SAFETY OF HUMAN LIFE

H. R. 477

TO AUTHORIZE ACQUISITION AND INTERCEPTION OF COMMUNICATIONS IN INTEREST OF NATIONAL SECURITY AND DEFENSE

H. R. 3552

AUTHORIZING ACQUISITION AND INTERCEPTION OF COMMUNICATIONS IN INTEREST OF NATIONAL SECURITY

H. R. 5149

TO AUTHORIZE THE USE IN CRIMINAL PROCEEDINGS IN ANY COURT ESTABLISHED BY ACT OF CONGRESS OF INFORMATION INTERCEPTED IN NATIONAL SECURITY INVESTIGATIONS

MAY 4, 20, AND JULY 8, 1953

Printed for the use of the Committee on the Judiciary

Serial No. 7

UNITED STATES
GOVERNMENT PRINTING OFFICE
30119 WASHINGTON : 1953

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[1] Elected to committee March 30, 1953 (H. Res. 194). Hon. Joseph R. Bryson, of South Carolina, a member of this committee, died on March 10, 1953.

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WIRETAPPING FOR NATIONAL SECURITY

MONDAY, MAY 4, 1953

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, in room 346, Old House Office Building, at 10 a. m., Hon. Kenneth B. Keating, chairman, presiding.

Present: Messrs. Keating, Crumpacker, Taylor, and Willis.

Also present: Mr. William R. Foley, committee counsel.

Mr. KEATING. The committee will come to order.

We have before us three bills, H. R. 408, H. R. 477, and H. R. 3552, all relating to the same general subject.

(H. R. 408, H. R. 477, and H. R. 3552 are as follows; also H. R. 5149.)

[H. R. 408, 83d Cong., 1st sess.]

A BILL To regulate the interception of communications in the interest of national security and the safety of human life

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Director of the Federal Bureau of Investigation of the Department of Justice, the Director of the Military Intelligence Division of the Department of the Army, the Director of Office of Special Investigations, Inspector General, United States Air Force, and the Chief of the Office of Naval Intelligence of the Navy Department under rules and regulations as prescribed by the Attorney General, are authorized in the conduct of investigations involving the safety of human life or to ascertain, prevent, or frustrate any interference or any attempts or plans for interference with the national security and defense by treason, sabotage, espionage, sedition, seditious conspiracy, violations of neutrality laws, violations of the Act requiring the registration of agents of foreign principals (Act of June 8, 1938, as amended), violations of the Act requiring the registration of organizations carrying on certain activities within the United States (Act of October 17, 1940 (54 Stat. 1201)), violations of the Atomic Energy Act of 1946 (60 Stat. 755), or in any other manner, to require that telegrams, cablegrams, radiograms, or other wire or radio communications and copies or records thereof be disclosed and delivered to any authorized agent of any one of said investigative agencies, or, upon the express approval of the Attorney General, to authorize their respective agents to obtain information by means of intercepting, listening in on, or recording telephone, telegraph, cable, radio, or any other similar messages or communications, without regard to the limitations contained in section 605 of the Communications Act of 1934 (48 Stat. 1103).

SEC. 2. Information acquired or obtained pursuant to section 1 of this Act shall be admissible in evidence, but only when offered in criminal proceedings in United States courts arising out of any of the foregoing investigations.

The existence or contents of such application or order shall not be disclosed except in connection with a criminal prosecution in which information obtained by intercepting communications pursuant to such order is sought to be introduced in evidence.

SEC. 3. Notwithstanding the limitations contained in section 605 of the Communications Act of 1934 (48 Stat. 1103) and without regard to any other provisions of this Act, information heretofore obtained, upon the express approval of the Attorney General, by means of intercepting, listening in on, or recording telephone, telegraph, cable, radio, or any other similar messages or communications, shall be admissible in evidence in United States courts in any criminal prosecution arising out of investigations of any of the violations enumerated in section 1 of this Act.

SEC. 4. No person shall fail to comply forthwith with the request of any duly authorized person, pursuant to section 1 of this Act, for the disclosure and surrender of any telegram, cablegram, radiogram, or other wire or radio communication, or copies or records thereof in his possession or under his control.

SEC. 5. No peson shall divulge, publish, or use the existence, contents, substance, purport, or meaning of any information obtained pursuant to the provisions of this Act otherwise than for the purposes hereinbefore enumerated.

SEC. 6. No person, other than those authorized pursuant to this Act, shall intercept, listen in on, or record telephone, telegraph, cable, radio, or any other similar message or communication, unless transmitted for the use of the general public or authorized by one of the parties to such message or communication, or his employment as a part of the message or communication system requires such action.

SEC. 7. Any person who willfully and knowingly violates any provision of this Act shall be fined not more than $10,000 or imprisoned not more than two years, or both.

SEC. 8. If any provision of this Act or the application of such provision to any person or circumstance shall be held invalid, the validity of the remainder of this Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

SEC. 9. For purposes of this Act the term "person" shall include any individual, partnership, association, business trust, corporation, or any organized group of persons, whether incorporated or not.

SEC. 10. The Attorney General is hereby authorized to prescribe such rules and regulations as he may deem necessary to carry out the provisions of this Act.

[H. R. 477, 83d Cong., 1st sess.]

A BILL To authorize acquisition and interception of communications in interest of national security and defense

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Director of the Federal Bureau of Investigation of the Department of Justice; the Director of the Military Intelligence Division of the Department of the Army; the Director of Intelligence, United States Air Force; and the Chief of the Office of Naval Intelligence of the Navy Department are authorized under rules and regulations as prescribed by the Attorney General, in the conduct of investigations, to ascertain, prevent, or frustrate any interference or any attempts or plans for interference with the national security and defense by treason, sabotage, espionage, seditious conspiracy, violations of neutrality laws, violations of the Act requiring the registration of agents of foreign principals (Act of June 8, 1938, as amended (52 Stat. 631)), violations of the Act requiring the registration of organizations carrying on certain activities within the United States (Act of October 17, 1940 (54 Stat. 1201)), or in any other manner, to require that telegrams, cablegrams, radiograms, or other wire or radio communications and copies or records thereof, or, upon the express written approval of the Attorney General, that any information obtained by means of intercepting, listening in on, or recording telephone, telegraph, cable, radio, or any other similar messages or communications, be disclosed and delivered to any authorized agent of any one of said investigatorial agencies, without regard to the limitations contained in section 605 of the Communications Act of 1934 (48 Stat. 1103). The information thus obtained shall be admissible in evidence, but only when such evidence is offered in a criminal or civil proceeding involving any of the foregoing violations in which the United States Government is a party: *Provided*, That prior to acquiring or intercepting the communications from which the information is obtained, an authorized agent of any one of said investigatorial agencies shall have been issued a permit by a judge of any United States court, authorizing the agent to acquire or intercept such communications.

(b) Upon application by any authorized agent of any one of said investigatorial agencies to acquire or intercept communications in the conduct of investigations pursuant to this section, a judge of any United States court shall issue a permit, signed by the judge with his title of office, authorizing the applicant to acquire or intercept such communications, if the judge is satisfied that there is reasonable cause to believe that the communications may contain information which would assist in the conduct of such investigations.

(c) No person shall fail to comply forthwith with the request of any duly authorized person, pursuant to this section, for the disclosure and surrender of any telegram, cablegram, radiogram, or other wire or radio communication, or copies or records thereof in his possession or under his control.

(d) No person shall divulge, publish, or use the existence, contents, substance, purport, or meaning of any information obtained pursuant to the provisions of this section otherwise than for the purposes hereinbefore enumerated.

(e) Any person who willfully and knowingly violates any provision of this section shall be guilty of a felony and upon conviction thereof shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(f) If any provision of this section or the application of such provision to any circumstance shall be held invalid, the validity of the remainder of this section and the applicability of such provision to other circumstances shall not be affected thereby.

(g) For purposes of this section, the term "person" shall include any individual, partnership, association, business trust, corporation, or any organized group of persons, whether incorporated or not.

(h) The Attorney General is hereby authorized to prescribe such rules and regulations as he may deem necessary to carry out the provisions of this section.

[H. R. 3552, 83d Cong., 1st sess.]

A BILL Authorizing acquisition and interception of communications in interest of national security

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Director of the Federal Bureau of Investigation of the Department of Justice; the Director of the Military Intelligence Division of the Department of the Army; the Director of Office of Special Investigations, Inspector General, United States Air Force; and the Chief of the Office of Naval Intelligence of the Navy Department are authorized under rules and regulations as prescribed by the Attorney General, in the conduct of investigations, to ascertain, prevent, or frustrate any interference or any attempts or plans for interference with the national security and defense by treason, sabotage, espionage, seditious conspiracy, violations of neutrality laws, violations of the Act requiring the registration of agents of foreign principals (Act of June 8, 1938, as amended (52 Stat. 631)), violations of the Act requiring the registration of organizations carrying on certain activities within the United States (Act of October 17, 1940 (54 Stat. 1201)), or any other manner, to require that telegrams, cablegrams, radiograms, or other wire or radio communications and copies or records thereof, or, upon the express written approval of the Attorney General, that any information obtained by means of intercepting, listening in on, or recording telephone, telegraph, cable, radio, or any other similar messages or communications, be disclosed and delivered to any authorized agent of any one of said investigatorial agencies, without regard to the limitations contained in section 605 of the Communications Act of 1934 (48 Stat. 1103). Such information shall be admissible in evidence, but only when offered in a criminal or civil proceeding involving any of the foregoing violations in which the United States Government is a party: *Provided,* That prior to acquiring or intercepting the communications from which the information is obtained, an authorized agent of any one of said investigatorial agencies shall have been issued a permit by a judge of any United States court, authorizing the agent to acquire or intercept such communications.

(b) Upon application by any authorized agent of any one of said investigatorial agencies to acquire or intercept communications in the conduct of investigations pursuant to this section, a judge of any United States court shall issue a permit, signed by the judge with his title of office, authorizing the applicant to acquire or intercept such communications, if the judge is satisfied that there is reasonable cause to believe that the communications may contain information which would assist in the conduct of such investigations.

(c) No person shall fail to comply forthwith with the request of any duly authorized person, pursuant to this section, for the disclosure and surrender of any telegram, cablegram, radiogram, or other wire or radio communication, or copies or records thereof in his possession or under his control.

(d) No person shall divulge, publish, or use the existence, contents, substance, purport, or meaning of any information obtained pursuant to the provisions of this section otherwise than for the purposes hereinbefore enumerated.

(e) Any person who willfully and knowingly violates any provision of this section shall be guilty of a felony and upon conviction thereof shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(f) If any provision of this section or the application of such provision to any circumstances shall be held invalid, the validity of the remainder of this section and the applicability of such provision to other circumstances shall not be affected thereby.

(g) For purposes of this section the term "person" shall include any individual, partnership, association, business trust, corporation, or any organized group of persons, whether incorporated or not.

(h) The Attorney General is hereby authorized to prescribe such rules and regulations as he may deem necessary to carry out the provisions of this section.

[H. R. 5149, 83d Cong., 1st sess.]

A BILL To authorize the use in criminal proceedings in any court established by Act of Congress of information intercepted in national security investigations

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of section 605 of the Communications Act of 1934 (48 Stat. 1103), information heretofore or hereafter obtained by the Federal Bureau of Investigation through the interception of any communication by wire or radio upon the express approval of the Attorney General of the United States and in the course of any investigation to detect or prevent any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense, shall be admissible in evidence in criminal proceedings in any court established by Act of Congress.

STATEMENT OF HON. KENNETH B. KEATING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. KEATING. Since I am the author of H. R. 477 which has been introduced in this and two preceding Congresses, I ask leave of the committee to make a short statement regarding the problem before us.

We are here today to study the entire problem of wiretapping. Several bills on the subject are before us. I desire to say a few words in support of H. R. 477, a bill to authorize certain Federal agencies directly concerned with national security to acquire, intercept, and divulge telephone, telegraph, and radio messages under certain circumstances.

I introduced bills similar to H. R. 477 in the 81st and 82d Congresses. While I have no pride of authorship in this particular bill, and no doubt it should be open to amendments, as this is a complicated matter, I think the importance of a good, clear Federal law on the subject of wiretapping cannot be overemphasized. I have been concerned with this matter ever since I came to Congress. In the hearings this morning and those which will follow I hope we can work out a measure that will end present confusion and unshackle our law-enforcement agencies, once and for all, to use this technique, with proper safeguards, in performing their duties.

The laws and court decisions affecting wiretapping have left the whole situation in a hopeless muddle. The Communications Act of

1934 provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish" its contents. This language has been held by the Supreme Court to apply to law-enforcement officers as well as private citizens. Some of the agencies that need to use wiretapping in their activities go right ahead and use it under this provision, in the belief that they can intercept messages so long as they do not divulge or publish them. The language is "intercept * * * and divulge." The Federal Communications Commission does not agree with this interpretation. And the courts have had a very difficult time deciding whether messages so intercepted can be used—even indirectly—as evidence in criminal prosecutions.

This problem was brought out dramatically in the trial of Judith Coplon. Her attorneys turned the trial into a fiasco, and won out for her on appeal, to a large extent because this law is so vague and unsatisfactory. The predecessor bill to H. R. 477 was introduced by me just a short time after the court of appeals reversed the conviction of Judith Coplon.

On the other hand, there is little or no protection for the privacy and sanctity of individual rights, as things now stand. Since wiretapping is more or less illegal, no matter who does it, the agencies—and even private investigators and plain snoopers—are tempted to use it more freely than they should. If they are caught, they always have the argument that they did not intend to divulge what they were listening to.

My bill, H. R. 477, is aimed at correcting this situation in both directions. On the one hand, it gives specific authority to all the Federal agencies that are responsible for national security to use wiretapping and similar techniques when they are investigating any activity that touches on treason, sabotage, espionage, or similar offenses; and it makes information they get in this fashion admissible in criminal prosecutions for such offenses. On the other, it requires approval of the Attorney General before information obtained in this fashion can be disclosed, and it requires an order, issued by a Federal judge on a showing that there is reasonable cause for the order, before any wires can be tapped or any messages can be intercepted in the first place.

This last provision is based on a law which has been in force in my own State of New York for a number of years. It has worked very well for us. Before any of our law-enforcement officers can put a tap on a telephone, they have to apply to one of our judges and show him why the tap is necessary and what they hope to discover by it. In this way, the public is protected against mere spying and "fishing expeditions." I think that is very important; none of us want a situation in which the police or anybody else can listen in on our private conversations unless there is a very good reason.

Our New York law works well in the other aspect, too. Once the judge has been shown that there is a reasonable cause for issuing the order, the officers have full authority to demand cooperation from the communications companies, the taps can be most effectively used, and there is no question that the evidence which is obtained in this matter will be properly admissible in court.

I don't think we should be the least bit soft or sentimental in considering this bill. A lot of people have raised a fuss about the dangers

of a police state, and invasions of rights, which tend to cloud our thinking and obscure the issues. I believe it was Judge Learned Hand who once pointed out something we tend to lose sight of: Law-enforcement agencies, and the Nation itself, have important rights which must be protected, too, if our laws are to be properly enforced and our Nation is to be fairly safeguarded against the designs of its avowed enemies.

We do not want to trifle with the great principle that every man's home is his castle. But we cannot apply it blindly. It is one thing to restrain interferences with what a man may do within his own four walls; it is quite another to let him use our modern network of communications media to plot the commission of crimes all over the country, or even all over the world, from behind the same protection.

H. R. 477 is limited to the detection of crimes which affect our national defense and security. That is the most important point of all to reach. Recent revelations concerning Communists and fellow travelers of American citizenship in the United Nations have furnished additional evidence of the imperative necessity that we protect our Nation from these enemies within. This danger is a continuing threat to our free institutions. Proper surveillance of enemies like Klaus Fuchs and the Rosenbergs would have made us much stronger in the face of threatened aggressions than we are at this moment.

We are faced each day with a sinister threat to the security of our Nation from traitors, spies, and saboteurs. It is both foolhardy and inexcusable to give them the protective privileges afforded by our present laws. If we are to cope successfully with the menace they present, we must untie the hands of those charged with the responsibility of apprehending these vicious characters who infest our precious land.

We have been spending billions of dollars in an effort to contain communism in Europe, the Middle East, and the Far East. Today we are still spilling the precious blood of our sons in actively fighting Communist aggression in Asia. At such a time it seems negligent and foolhardy in the extreme to delay placing this additional weapon in the arsenal of our Federal investigating bodies right here at home.

The use of the telephone is vital to the work of potential and actual saboteurs and enemy agents. At the present time there is no question that wiretapping is being carried on by both private and Government investigators—but they are compelled to go about it almost as furtively as the criminals they are watching. The passage of this proposed measure would not mean that we condone its unlimited or indiscriminate use. It would be limited to crimes involving the security of our country.

Invasion of privacy is repugnant to all Americans. And it should be. Nevertheless, the safety of our Nation and its people must be paramount.

Some of the Federal agencies which are concerned with this problem are present here today, and will be called upon to express their views and make whatever suggestions they may wish to offer. Others will be heard at a subsequent meeting. H. R. 477 has been submitted to all other interested agencies, and all will be given an opportunity

to be heard. I am aware that we must proceed carefully, and not lose sight of the ultimate requirement that this must be a fair law, and workable—the very best that we can produce.

At the same time, we must not neglect the urgency of the matter. This situation must be righted quickly. Every day we lose is so much additional comfort to our hidden enemies, who are working tirelessly among us.

I intend to do everything in my power to impress upon the Congress the desirability of early action in this field. I have already talked with a good many Members about this subject and it is my hope that this committee can report favorably legislation dealing with it as quickly as possible. We have delayed too long already in coming to grips with this problem.

Now, we have here today as a witness representing the Department of Defense, Mr. Charles R. Wilson, of the Office of Naval Operations. With him is Mr. Gilbert R. Levy, Directorate of Special Investigations, United States Air Force.

Mr. Wilson, we would be very glad to hear from you if you will come forward, please.

STATEMENTS OF CHARLES R. WILSON, OFFICE OF CHIEF OF NAVAL OPERATIONS, DEPARTMENT OF THE NAVY; AND GILBERT R. LEVY, DIRECTORATE OF SPECIAL INVESTIGATIONS, UNITED STATES AIR FORCE

Mr. WILSON. Mr. Chairman, I was informed that this would be a hearing with reference to S. 832. Actually, we have reviewed several bills: S. 832, H. R. 3552——

Mr. KEATING. What is S. 832?

Mr. WILSON. Senate bill 832. I was told that this statement would be a commentary on that particular piece of legislation.

Mr. KEATING. Told by whom?

Mr. WILSON. By our Office of the Judge Advocate General of the Navy.

Mr. KEATING. Who is the author of S. 832?

Mr. FOLEY. I believe that is Senator Wiley's bill.

Mr. WILSON. I think it is Senator Langer, Mr. Chairman.

Mr. FOLEY. Senator Wiley and others.

Mr. KEATING. I imagine that that is a duplicate of H. R. 477.

Mr. WILSON. It is quite similar, yes, sir; but our statement is slanted along the lines of supporting S. 832.

Mr. KEATING. Have you compared it with H. R. 477?

Mr. WILSON. It has been compared. It compares quite similarly to H. R. 477. I have not compared it identically but it is quite similar.

Mr. KEATING. I am reading from the Congressional Record of February 6, 1953—and I know it followed a conversation which Senator Wiley had with me back in the previous Congress. In this statement at the time he introduced the bill——

Mr. WILSON. These are Senator Wiley's words?

Mr. KEATING. Yes, sir.

Therefore introducing a companion bill to H. R. 477 introduced by Congressman Keating of New York—and he goes on.

So I think it is identical, or substantially identical, with H. R. 477.

Mr. WILSON. I believe that is right, Mr. Chairman. I just wanted to make the point that our comment had been basically on S. 832.

Mr. KEATING. Thank you.

Mr. WILSON. Mr. Chairman, I am Mr. C. R. Wilson of the Office of Naval Intelligence. The opportunity to testify on behalf of the Department of Defense before this subcommittee is very much appreciated.

Our position is that the enactment of legislation designed to authorize the interception of communications in certain cases will serve to enhance the internal security of the United States. To this practice, there must and should be certain safeguards. Such legislation should apply only to cases in which the United States will be a party in criminal action and should be authorized only when certain categories or suspected categories of offenses are under investigation.

The need for legislation of this type as a protection for the mass of Americans is obvious. It seems contradictory that we would jeopardize the welfare of our citizens for the benefit of any individual or group by refusing to provide for measures to counter such efforts.

S. 832 is a constructive step in the bolstering of our laws relating to internal security. The Department of Defense recommends several changes in S. 832 as presently written. Very briefly, these changes are:

Amend the bill to vest in the Attorney General authority to authorize the rules and regulations governing the acquisition or interception of communications where such pertain to investigations within the investigative jurisdiction of the Department of Justice.

Amend the bill to authorize the Secretary of each of the military departments similar authority for investigations within the jurisdiction of his department.

Amend the bill to extend its coverage to cases involving the safety of human life.

Amend the bill by strengthening the authority for the actual interception of communications without regard for the provisions of section 605 of the Communications Act of 1934. This appears in line with the intent of S. 832.

This is a statement of general support in behalf of S. 832, subject to the amendments enumerated above. Operational matters under such legislation will, I am sure, be discussed as required by qualified representatives of the affected agencies. I request very respectfully that such discussion be held in executive session.

This statement has been coordinated within the Department of Defense; lack of time has precluded coordination with the Budget Bureau.

Notice has been taken of the provisions of H. R. 3552, H. R. 408, and H. R. 477 which are similar in some respects to S. 832. The comments included herein regarding S. 832 are applicable to those bills as appropriate to each.

I am grateful for the committee's thoughtfulness in permitting testimony in behalf of S. 832.

Mr. KEATING. Let me ask you, Mr. Wilson, regarding the proposals for amendment to invest in the Attorney General authority to issue rules and regulations governing those investigations in the jurisdiction of the Department of Justice and similar authority to the Secretary of

the military departments. You did not mean that they should be given any authority which might be in derogation of or to overrule the court authorization for the interception, did you?

Mr. WILSON. Mr. Chairman, our thought was that it would be preferable to have the authority governing this centralized in the Attorney General with authority for the Defense Department agencies to operate within their own services in those type cases.

Mr. KEATING. And not have the application made to the court?

Mr. WILSON. Not have the application made before a Federal judge. The reasoning on that——

Mr. KEATING. I think perhaps the Attorney General may also favor that, but I have serious doubt——

Mr. WILSON. The reason for that was one of security in having to disclose certain facts relating to a case of that nature before it might become expedient to do so. That was the thought.

Mr. KEATING. They can always seal the papers in a court proceeding where this question arises, and one of the protections afforded by H. R. 477, and I believe the others, is to have the court pass on the question because there might be efforts being made to intercept communications which are improper and where a court should have that authority to stop one of the agencies of the Government which was acting improperly.

I see your point that you feel the Attorney General or the Secretary of one of the services should have the discretion in the matter rather than to have final discretion rest with the court.

Mr. WILSON. That was our point.

We had also made a suggestion there that this authority be vested with the Secretaries of the respective services rather than with the Director of Naval Intelligence or the Directorate of Special Investigations of the Air Force, feeling, perhaps, that to vest it in a lower echelon would tend to create a statutory office and that it would be better within the Department for it to stem from the highest authority within the Department.

Mr. KEATING. On your proposed amendment to extend the bill to other than cases involving national security, I would think that might give us some pause because it is something of a departure and it might be the feeling of many that it should be limited to national security.

Mr. WILSON. I think that was put in, Mr. Chairman, in line with the provisions of a clause in 408 which contains that particular phraseology.

Mr. KEATING. In the present Communications Act?

Mr. WILSON. In line with 408. I think the intent of that is probably slanted toward kidnaping cases or things of that nature where human life would be endangered by not being able to take full advantage of means to effect the recoveries which might be necessary.

Mr. KEATING. We probably will find it necessary to have an executive session; at least, the committee will take under consideration your request for that because we appreciate the fact that it may be necessary to discuss some of these matters in such a session.

Mr. WILSON. We will be very happy to assist.

Mr. KEATING. Mr. Crumpacker, did you have any questions?

Mr. CRUMPACKER. This amendment which you have referred to which would extend it to cases involving human life, do you have any other cases than kidnaping in mind?

Mr. WILSON. I have nothing in mind. Actually, that would be more within the supporting purview of the Department of Justice. We put it in there as being desirable from our standpoint because it had appeared in one of the bills which were under scrutiny. It is quite possible that extortion or blackmail could be included with kidnaping as the type of investigation which could conceivably involve human jeopardy.

Mr. CRUMPACKER. Do you have in mind any particular cases that would be peculiar to the Department of Defense in that respect?

Mr. WILSON. No; I do not.

Mr. TAYLOR. This one suggestion, to give the Attorney General authority to authorize rules and regulations—what would you think of a possible compromise on that? No greater invasion of privacy takes place than to go into a man's house and search it and examine his papers, his bed clothing, if necessary, and a warrant could be procured to do such a thing by appearing before a commissioner. Would you suggest that perhaps commissioners be authorized to issue warrants or authorizations to wiretap under circumstances where probable cause existed to believe that a crime was being committed?

Mr. WILSON. I would respectfully ask that I be not requested to comment specifically on that because I have not given it any consideration. As you say, it is a point which might bear some examination.

Mr. KEATING. Mr. Foley, do you have any questions to ask?

Mr. FOLEY. Yes, sir.

Could you possibly elucidate a little bit more on your proposed amendment No. 4 there, the strengthening of authority for actual interception of communication with regard to 605?

Mr. WILSON. Yes. The legislation as written seems to contain the implication that you would be authorized to intercept but it does not contain the express authority to intercept. Now, the purpose of that was simply to amend that wording slightly to allow the agencies concerned under the conditions which are prescribed, to actually intercept the communications. It is a very minor operational detail, I realize, but we felt that it would perhaps be well to comment on it.

I think you will find—it appears on about line 8 to 14 in S. 832, and the change in the wording would be relatively minor, Mr. Foley.

Mr. FOLEY. Let me call your attention to this: Take H. R. 477, on page 3, subsection (b). If you will notice there the application is made to a Federal judge.

Mr. WILSON. Yes, sir.

Mr. FOLEY. On line 7, I read:

> a judge of any United States court shall issue a permit, signed by the judge with his title of office, authorizing the applicant to acquire or intercept such communications, if the judge is satisfied that there is reasonable cause to believe that the communications may contain information which would assist in the conduct of such investigations.

Mr. WILSON. Yes, sir.

Mr. FOLEY. That is the actual authority to intercept under 477. That is very definite and clear.

Mr. WILSON. All right.

Mr. FOLEY. Just one more question, Mr. Keating.

In your testimony you have properly pointed out the possible ramifications arising from an appearance before a Federal judge to obtain a court order to intercept. I would like to point out to you along the

lines of the chairman what has been a practice in New York in which I have been involved, namely this, that we draw our affidavits of reasonable cause. They are drawn in the district attorney's office. They are taken by the assistant who draws them to a judge of the Supreme Court, or a county judge, and in most instances you will find that a single judge is the one that is always approached. It is an ex parte proceeding. You submit it to him in his chambers. There is nobody else present but the judge and the maker of the affidavit. He reads it. If he is satisfied that those are the grounds, he signs the order right there. He takes the affidavit and the order, seals it in an envelope, writes his name across the back, and places it in his own safe in his office. The other copy is retained, of course, by the party making out the affidavit. That is the procedure in New York.

I just point that out as a possibility from a practical standpoint.

Mr. WILSON. I am very grateful for that information. I am sure we would have to arrive at some such way to safeguard the existence of a pending investigation.

Mr. KEATING. I agree entirely with that; it must be carefully handled. But I happen to believe at the moment that there would be a greater public acceptance of the bill and what it is seeking to accomplish if the additional safeguard of having the matter passed on by a Federal judge were in the bill.

However, we will be glad to hear any witnesses on that subject.

Mr. WILSON. Yes, sir.

Are there any other questions?

Mr. WILLIS. So we can get the benefits of what you have in mind, have you tried to work out some language at the appropriate points in the bill that would be appropriate to carry out the four proposed amendments you suggest?

Mr. WILSON. I think that the Defense Department has some language proposed; yes, sir. I have not done any composing on that myself, but I believe the Department would take a stand on that.

Mr. WILLIS. What you ask us to do is, you suggest that we——

Mr. WILSON. We will be glad to submit anything the committee desires.

Mr. WILLIS. To carry out what you generally have in mind so we can pinpoint it down. If you could submit some language at a line or point in the bill, what language would carry out what you have in mind.

Mr. WILSON. If the committee desires, we will be glad to study the proposition.

Mr. KEATING. Are there any other questions?

If not, thank you very much, Mr. Wilson.

Mr. Levy, would you also like to be heard?

Mr. LEVY. Mr. Chairman, I concur with what Mr. Wilson has said. There is just one minor point that we may take into consideration. On line 6 of H. R. 477, there is a reference to the Director of Intelligence, United States Air Force, because of a change within the Department of the Air Force, the investigative arm of the Air Force is now the Directorate of Special Investigations, United States Air Force.

Mr. KEATING. The Directorate?

Mr. LEVY. Yes, sir.

Mr. KEATING. Would you make a note of that?

Mr. LEVY. That is all I have, Mr. Chairman.

Mr. KEATING. Thank you, Mr. Levy.

Now, Mr. Foley, what day do you think the other witnesses would be prepared to appear before this committee? We have got to get these hearings out of the way as early as possible.

Mr. FOLEY. As I have already mentioned to you, Mr. Keating, the Department of Justice has requested a minimum of 10 days to 2 weeks when they will have a report and be prepared to testify.

The Federal Communications Commission has requested a minimum of 2 weeks.

Mr. KEATING. Is there anyone here today from the Federal Communications Commission?

Mr. FOLEY. No, sir.

Mr. KEATING. Is 2 weeks from today all right with the other members?

(Discussion off the record.)

Mr. KEATING. Then the committee will stand adjourned until Wednesday, May 20, at 10 a. m., when we will complete our hearings on this matter.

I hope the counsel for the committee will notify all of the Government agencies concerned and also any other organizations or groups who may have expressed interest in this legislation either for it or against it. We want to give full opportunity to everyone who wishes to be heard on the 20th.

The committee will stand adjourned.

(Whereupon, at 10:45 a. m., the meeting was adjourned.)

WIRETAPPING FOR NATIONAL SECURITY

WEDNESDAY, MAY 20, 1953

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to call, at 10:10 a. m., in room 346, Old House Office Building, Hon. Kenneth B. Keating, chairman of the subcommittee, presiding.

Present: Representatives Kenneth B. Keating (chairman of subcommittee), Shepard J. Crumpacker, Jr., Edwin E. Willis, and Sidney A. Fine.

Also present: William R. Foley, counsel.

Mr. KEATING (presiding). The committee will come to order.

At this point we will have inserted in the record H. R. 408, H. R. 477, H. R. 3552, and H. R. 5149.

(The bills referred to are printed at beginning of this document.)

We are happy to have this morning with us the chairman of the Judiciary Committee who has, on May 12, and since these hearings started, introduced H. R. 5149.

Mr. Reed, we will be happy to hear you first.

STATEMENT OF HON. CHAUNCEY W. REED, A REPRESENTATIVE IN CONGRESS FROM THE 14TH DISTRICT OF ILLINOIS

Mr. REED. Mr. Chairman, as you have stated, H. R. 5149, which I introduced, is, I believe, the fourth bill that is now before this subcommittee on consideration on this subject matter.

On May 7, or shortly thereafter, I received an executive communication which, in its regular order of business, was sent from the Office of the Attorney General to the Speaker of the House of Representatives and by him transmitted to our committee. This executive communication reads as follows:

> DEAR MR. SPEAKER: It is recommended that legislation be enacted to authorize the use in criminal proceedings in Federal courts of information obtained by intercepting of communications in the course of investigations relating to the protection of the national security or defense. Such legislation is vital for the adequate safeguarding of our country and its way of life.
>
> It is quite unrealistic and thoroughly unreasonable that, though evidence is obtained showing clear violations of the laws against subversions, the hands of the prosecuting officers are tied and their efforts to maintain the security of the Nation are thwarted.
>
> As the law now stands, the Government of the United States is under a serious handicap in protecting itself against spies, saboteurs, and others who are intent on interfering with or endangering national security.

39119—53——2

I believe that legislation should be enacted which would, under proper safeguards, permit the use in evidence in Federal courts of information obtained by wiretapping.

The attached proposal which I commend to your consideration is limited in several respects:

In the first place, its application would be restricted to investigations relating to the national security or defense.

Secondly, wiretap evidence would be admissible only when obtained by the Federal Bureau of Investigation.

Thirdly, wiretapping within the contemplation of the bill would require the express approval of the Attorney General.

Finally, wiretap evidence would be admissible only in criminal proceedings in Federal courts.

Convinced of the need for such legislation and satisfied that the attached bill contains the necessary safeguards and limitations to warrant its favorable consideration, I invite your cooperation in bringing it before the Congress.

The Bureau of the Budget has advised there is no objection to the submission of this recommendation.

Sincerely,

HERBERT BROWNELL, JR.
Attorney General.

As a result of this executive communication, I introduced 5149, which is one of the four bills now before the subcommittee for consideration, and Mr. Rogers of the Attorney General's office is here today to express the views of the Attorney General in particular with regards to this legislation.

Mr. KEATING. I imagine, Mr. Reed, you would prefer to have the committee question Mr. Rogers regarding details.

Mr. REED. I think so.

Mr. KEATING. I think before hearing Mr. Rogers we should hear our colleague, Mr. Celler, of New York, who is the author of H. R. 408, and we are happy to have him here to express his views with regard to his bill or this general subject.

STATEMENT OF HON. EMANUEL CELLER, A REPRESENTATIVE IN CONGRESS FROM THE 11TH DISTRICT OF NEW YORK

Mr. CELLER. Mr. Chairman, members of the committee, as you indicated, I have offered H. R. 408 to permit use of evidence and information obtained from that evidence by way of wiretapping.

I want to say, Mr. Chairman, I offered a bill of this character 13 years ago, way back in 1940, and have offered bills permitting wiretapping ever since; and, incidentally, I was one of the first to offer that type of bill. I did it when it wasn't very popular to offer or have considered such a bill. It was at the time just before World War II when the Nazis and Fascists were afoot and endeavoring to obtain various secrets of our Government.

I have worked diligently all through those years to pass a bill of this character, and have had many brickbats thrown at me because I was attacking or endeavoring to corrode our civil liberties by the introduction and the attempt to have passed such a bill; but a climate has been developed which is entirely changed since then, and I think a fair opportunity now is presented to have passed a bill of this character.

Now, if you don't mind, I would like to go over some of the provisions of my bill and then point out differences between my bill and one or two of the others that have been offered.

In a word, the bill provides:

That the Director of the Federal Bureau of Investigation of the Department of Justice, the Director of the Military Intelligence Division of the Department of the Army, the Director of Office of Special Investigations, Inspector General, United States Air Force, and the Chief of the Office of Naval Intelligence of the Navy Department, under rules and regulations as prescribed by the Attorney General, are authorized in the conduct of investigations involving the safety of human life or to ascertain, prevent, or frustrate any interference or any attempts or plans for interference with the national security and defense by treason, sabotage, espionage, sedition, seditious conspiracy, violations of neutrality laws, violations of the act requiring the registration of agents of foreign principals (act of June 8, 1938, as amended), violations of the act requiring the registration of organizations carrying on certain activities within the United States (act of October 17, 1940)—

that is the Smith Act—

violations of the Atomic Energy Act of 1946, or in any other manner, to require that telegrams, cablegrams, radiograms, or other wire or radio communications and copies or records thereof be disclosed and delivered to any authorized agent of any one of said investigative agencies, or, upon the express approval of the Attorney General, to authorize their respective agents to obtain information by means of intercepting, listening in on, or recording telephone, telegraph, cable, radio, or any other similar messages or communications, without regard to the limitations contained in section 605 of the Communications Act of 1934.

You may remember that section 605 proscribed and prevented the use of information obtained by so-called wiretaps.

Now, it would be naive to suppose there is no wiretapping now. I am almost of the belief that it is a most widespread practice, and it is probably most widespread right here in the District of Columbia. It is a practice indulged in by Government officials. It is a practice indulged in by private individuals, and private individuals do it all over the country.

Sometimes one is very fearful whether one should ever use the telephone when he wishes to impart something of importance or gravity. I am sure that feeling has come to every Member of Congress, every Member of the Senate, right here in the District of Columbia, and I think the time has come when we must have this two-edged sword:

One, to help the Government agencies having jurisdictions over these matters to ferret out the crimes of espionage and treason and sabotage, and so forth, and thereby try to prevent the carrying out of nefarious purposes along those lines; and

Secondly, as this bill would provide and other bills would provide, to make it a criminal offense to indulge in unauthorized tapping or intercepting of wire communications.

So efforts should be made at all times to acquaint the public with the fact that this is also a protection for the public itself against unwarranted interference with private communications. That is not expressed enough, and I hope the press here this morning will stress that phase of it because I have received communications upon the introduction of the bill claiming that I am trying to hurt and harm our civil liberties by allowing these interferences by way of taps, and they never say a word about the protection a bill of this sort would afford the public—and it is in that sense a safeguarding of our civil liberties.

Now, section 2 of my particular bill says:

Information acquired or obtained pursuant to section 1 of this act shall be admissible in evidence, but only when offered in criminal proceedings in United States courts arising out of any of the foregoing investigations.

Now, I think the Association of the Bar of the City of New York has criticized that limitation, wherein I say that the evidence can be used only in criminal proceedings, and they ask the query: "Why shouldn't it be used in civil proceedings?"

Now, I, personally, at this juncture don't know why. I don't know the basis for their statement that the evidence obtained should be used in civil proceedings.

The crimes that we are endeavoring to frustrate, which are mentioned in section 1, are on the criminal side. They are not on the civil side.

So, I think in the interests of endeavoring to limit this power, I think it is best to limit the use of wiretaps with reference to evidence in criminal proceedings and not bring in civil proceedings.

Now, I may be wrong on that. At this moment I can't conjure up any reasons why we should include civil proceedings. Perhaps the chair or members may think otherwise, in which event it would be perfectly proper to add the words "civil proceedings," but at this time I can't conceive why we should expand it to civil proceedings.

Now, the balance of section 2 I suggest be stricken, and I make that statement because of a communication our distinguished chairman has received from the Deputy Attorney General under date of February 10, and he states as follows:

> DEAR MR. CHAIRMAN. Your attention is invited to an error in H. R. 408—

That is the bill I am discussing—

> a bill to regulate the interception of communications in the interest of national security and the safety of human life—now pending before the Committee on the Judiciary.
>
> The second paragraph of section 2 of the bill reads as follows—and this is the language I suggest be excised:
>
> "The existence or contents of such application or order shall not be disclosed except in connection with a criminal prosecution in which information obtained by intercepting communications pursuant to such order is sought to be introduced in evidence."
>
> Since the bill contains no reference to or provisions for any application or order, it is clear that the quoted language was erroneously included and should be deleted.

I agree with that.

Section 3 of my bill states:

> Notwithstanding the limitations contained in section 605 of the Communications Act of 1934 and without regard to any other provisions of this act, information heretofore obtained, upon the express approval of the Attorney General, by means of intercepting, listening in on, or recording telephone, telegraph, cable, radio, or any other similar messages or communications, shall be admissible in evidence in United States courts in any criminal prosecution arising out of investigations of any of the violations enumerated in section 1 of this act.

Section 4——

Mr. WILLIS. Is that an admission that this sort of thing has gone on, anyway?

Mr. CELLER. I beg your pardon.

Mr. WILLIS. Is that an admission now on your part that this thing has gone on, anyway?

Mr. CELLER. I think it is a fair inference. I think, as I said before, we would be naive if we would say there is no such thing as wiretapping. I know in my own city of New York it is widespread, and I

am sure the distinguished chairman, who comes from my State, knows that it is widespread in New York State; and we have had many disclosures of such activities. However, this is not an investigation of wiretapping.

Section 4:

No person shall fail to comply forthwith with the request of any duly authorized person, pursuant to section 1 of this act, for the disclosure and surrender of any telegram, cablegram, radiogram, or other wire or radio communication, or copies or records thereof, in his possession or under his control.

That is obvious. The Western Union or the commercial cable corporation might have records and they should be disclosed when there is an authorized, authorized under this act, wiretap.

Section 5:

No person shall divulge, publish, or use the existence, contents, substance, purport, or meaning of any information obtained pursuant to the provisions of this act otherwise than for the purposes hereinbefore enumerated.

Section 6:

No person, other than those authorized pursuant to this act shall intercept, listen in on, or record telephone, telegraph, cable, radio, or any other similar message or communication, unless transmitted for the use of the general public or authorized by one of the parties to such message or communication, or his employment as a part of the message or communication system requires such action.

Section 7:

Any person who willfully and knowingly violates any provision of this act shall be fined not more than $10,000 or imprisoned not more than 2 years, or both.

That is obvious.

Section 8:

If any provision of this act * * *.

That is a separate bill at this point.

Section 9:

For purposes of this act the term "person" shall include any individual, partnership, association, business trust, corporation, or any organized group of persons, whether incorporated or not.

Section 10:

The Attorney General is hereby authorized to prescribe such rules and regulations as he may deem necessary to carry out the provisions of this act.

Now, there are some who want to spell out in the bill—I think some may want to testify along those lines, and they did in previous hearings—that the record should be kept secret; that the recordings of communications, whether it is on wire or wax, shall be kept in a central place, and that irrelevant material should be excised or the recordings at some stated time, under certain circumstances, might well be destroyed; that there might be some limitation on the duration of the authority to tap wires, and many other such provisions.

Now, I don't think they should be set forth in a bill. I think those provisions should remain fluid, depending upon changing conditions; and I think we should have faith and confidence in the Department of Justice and its head, and wherein I said he shall have the power to make and promulgate regulations, and he can, therefore, envisage the need to regulate those items and many more that I have set forth.

So, when I say that the Attorney General is authorized to prescribe rules and regulations, I think this should be sufficient.

Now, I should like to go back just a minute and read from some of the testimony that was given way back in 1940 on this same bill.

It is interesting to note that every Attorney General from Attorney General Mitchell on to the present Attorney General has approved wiretapping under the safeguards similar to the ones I have announced.

For example, here is a part of the communication from Attorney General Jackson, which was addressed to me way back in 1940—May 31, 1940. I will not read the entire letter, just the pertinent paragraphs:

> In a limited class or case, such as kidnaping, extortion, racketeering, where the telephone is the usual means of conveying threats or information, it is the opinion of the present Attorney General—

that was Jackson—

> as it was of Attorney General Mitchell, that wiretapping should be authorized under some appropriate safeguard. Under the existing state of the law and decisions, this cannot be done unless Congress sees fit to modify the existing statutes.

The philosophy underlying the foregoing remarks, which were directed to the activities of the underworld, would seem applicable with even greater force to the activities of persons engaged in espionage, sabotage, and other activities interfering with the national defense.

Way back in those days I called attention to the fact that I had gone on radio, setting forth the provisions of the bill I had offered, and I said, as a result of the one broadcast, I had received in 1 day almost 3,000 letters approving the provisions of the bill, and only 20 letters indicated opposition, and that there had been something like 5,000 more communications, roughly, received by the radio stations approving the bill.

Now, that was rather startling to me at that time, and that seemed to me an overwhelming sense of approval of the bill.

Then the question arose, even back there in those days, whether or not the authority to allow the wiretaps should be lodged with the Attorney General or with a judge of the United States district court—and I will read a bit of my testimony:

> I cannot see how it could be carried on—

carried on if the justice of the district court was to authorize the wiretap—

> because secrecy is absolutely the essence. Someone has said three men can keep a secret if two men die. If they are compelled to go into the court, you have the clerk, the person seeking the order, the stenographer, some officer, and the judge hearing evidence in support of the petition upon which the order is to be granted. That would utterly destroy the necessary secrecy that must surround applications of this sort.

I am still of the opinion, since secrecy, uttermost secrecy, is essential for the success of any kind of an interception of wire communications, that by making an application to the court, ex parte, which would probably have to be in writing, where the contents could be observed by more than the judge, where records must be kept, you destroy that possibility of secrecy and to that degree you make the wiretap useless.

I believe that is the opinion of the Attorney General, and has been the opinion of the Attorneys General from Mitchell on.

Beyond that, you have to have some degree of uniformity here. If you are going to allow a district judge to give permission to wiretap, you are going to have every judge devising his own plan, a method whereby this shall be done, and you would, therefore, have a failure of uniformity and grave difficulties emitting from that lack of uniformity.

What precautions would the judge use?

Every judge would have his own method of proportions. You would have considerable confusion.

Beyond that, you take in a case of the State of Montana, which is 600 miles in length—I think that is the area. I would have to correct the record if it isn't 600—I think there is 1 Federal judge in the State of Montana. Well, he may be on vacation. It may be necessary to get action quickly. He may be 300, 400, 500 miles away. How are you going to get him?

That situation might well also develop in Texas. When you consider the vast expanse of Texas, a district judge may be hundreds of miles away.

Speed is essential in these matters. If you have to go to a Federal judge who may be sick or disabled, who may be on vacation, who may be fishing, then you leave the officials who want to get the authority stranded; and I believe, therefore, it would be far better to have this authority centralized in the Attorney General, when members of the Judiciary Committee could watch this situation.

I have every confidence in the present Attorney General, and I happen to know him personally, and I would implicitly give this authority to the Attorney General without the slightest equivocation, without the slightest hesitation.

If at some future time we feel the Attorney General isn't of that high stamp, we can withdraw the privilege; we can watch it; we can investigate; we can do all sorts of things to protect the citizens' rights.

But, after a great deal of thought on this matter, I think it would be better to have the matter lodged, the power lodged, in the Attorney General.

There may be some abuses. You always have to envisage abuses. You can't help it. That is the price we have to pay for betterments, although I can't conceive how the Attorney General would be guilty of any abuses, except that he might in turn delegate the power to someone. I have confidence in him that he would only delegate it to someone who in turn was responsible.

Lastly, we have a provision in our New York Code of Criminal Procedure permitting ex parte order interception of telephone or wire or radio communications. In New York we provide that it can only be done upon an ex parte order of a judge.

This is no reflection on any of the judges in New York.

But I fear there are some abuses which defeat the very purposes of a court order.

Now, I happen to know that there is no secrecy on occasions in the granting of these ex parte orders in New York, and I think we ought to take a leaf from that New York book and be mighty careful.

For that reason, I am of the opinion that only the Attorney General should have the right and there should be no need to go to a United States district court for this order.

I have also, which I will put in the record, a communication from then Attorney General J. Howard McGrath, under date of February 2, 1951, also asking for this authority and approving the bill which I had offered during his administration.

Mr. KEATING. That will be received.

(The letter referred to is as follows:)

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., February 2, 1951.

HON. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN: In my letter of January 17, 1951, I enclosed for the consideration of the Congress a proposed bill to regulate the interception of communications in the interest of national security and the safety of human life. As you know, the measure was introduced on January 23, 1951, as H. R. 1947.

The early enactment of this bill, in my opinion, is highly desirable. The Department of Justice has been seriously hampered in fulfilling its statutory duty of prosecuting those who violate the Federal laws relating to the national defense and security because of the failure of Congress to enact legislation of this type. It would seem that in view of the present national emergency even more serious harm to the Government may result in the absence of appropriate remedial legislation.

The Department has in the past been adversely affected in its ability to prosecute four major types of national-security cases by reason of the fact that evidence obtained by wiretapping is inadmissible in the Federal courts. First, there are cases where all the evidence was obtained by wiretapping and, second, there are others where some admissible evidence exists but the vital evidence, without which the admissible information is insufficient, was obtained by wiretapping. Under present law the Government is completely forestalled from prosecuting, even though guilt may be clear, in these two categories of cases. Third, there are cases where telephone taps provided no evidence but did provide leads or clues from which evidence was obtained and, fourth, there are cases where the wiretapping activities not only produced no evidence whatever but did not even produce any leads. Present law does not prevent prosecution in these types of cases, but nevertheless prosecution may well be blocked because the fact that wiretapping was practiced requires a pretrial inquiry into the nature of the information acquired thereby to show that independent evidence was used or that nothing material was obtained by the taps. However, even though this could be established, the Government for security reasons might not be willing to identify the telephones which were tapped or to disclose the information so obtained in order to establish that it was not germane to the case.

While the number of telephone surveillances in use at any given time is relatively small and each one is instituted only at the express direction of the Attorney General, there have been a number of cases in past years which could not be prosecuted under existing law. It is impossible, as you will appreciate, to identify any of them by name. However, an illustration of the manner in which law enforcement by the Department is unwarrantedly obstructed in cases where wires were tapped may be found in the recent prosecution of Judith Coplon for espionage. It was first necessary to hold an extensive preliminary hearing at which every investigative report and other document relating to the case in the possession of the Federal Bureau of Investigation were submitted to the trial judge. Then, although that jurist was completely satisfied that no evidence, leads, or clues were obtained by wiretapping and that some of the material—obviously having no bearing on the case because of such finding—should not be disclosed to the defense for security reasons, and although the court of appeals expressly stated that Miss Coplon's guilt was plain, the latter court held it reversible error not to have made full disclosure of all such material to the defendant.

In addition to the vital need for the bill in future security investigations, I may say that section 3 would go far to remedy the defect in existing law in the cases involved in categories 1 and 2. Information in the Department's possession, which cannot be used at present, would become available for use in proper cases where the statute of limitations has not yet run. As to the cases in categories 3 and 4, the section would also be of material assistance because, if wiretapping evidence is admissible, there would be no need to have a hearing to establish

whether or not there is evidence independent of leads or clues obtained by that procedure.

The burden which the failure to enact remedial legislation has imposed upon this Department is clearly apparent, I believe, from the foregoing. I earnestly hope that H. R. 1947 may be enacted as expeditiously as possible.

Sincerely,

J. HOWARD MCGRATH,
Attorney General.

MR. CELLER. I think that is all, Mr. Chairman.

MR. KEATING. Thank you very much, Congressman Celler. You have been very helpful to the committee.

I don't want to have anything that I may say or any questions I may ask of you construed as indicating that the chairman has a closed mind on this subject at all, because we are trying to devise and report out a bill which will work best and will accomplish what we are trying to do.

I am inclined to agree with your statement that the bill should have a twofold purpose:

(1) To attempt to meet the problem arising from violations of statutes affecting our national security; and

(2) To make it clear that we frown upon illegal wiretapping and to provide stiff penalties for such illegal wiretapping.

In that respect, I, at the moment, am entirely in accord with the provisions of your bill. In fact, as I read them, they are, excepting two particulars, substantially the same, perhaps with a change in phrascology, with the bill which I introduced; H. R. 477, and those two respects are, as I see it:

(1) That yours provides for use of this evidence and the authorization of intercepting communications in the case of violation of statutes involving the safety of human life, whereas my bill is restricted to offenses involving national security and defense.

MR. CELLER. Does your bill include kidnaping?

MR. KEATING. No; it does not.

MR. CELLER. That is the reason why I use that phrase.

MR. KEATING. I wanted to discuss that with you for a moment.

If we should decide to go beyond espionage, treason, and other offenses involving the national security, I wonder if that language isn't rather broad—the language involving the safety of human life. I suppose that might involve armed robbery, or assault, or——

MR. CELLER. It might.

MR. KEATING. I am not——

MR. CELLER. Yes.

MR. KEATING. Asking. I am thinking out loud.

MR. CELLER. Well, I used——

MR. KEATING. You had kidnaping in mind?

MR. CELLER. I used that language because it was in the bills that had been recommended by Mitchell and Jackson and Biddle and the other Attorneys General in the old days, and I just kept it in there because of kidnaping.

You see, the FBI has great difficulty in running down these kidnapers.

Of course, kidnaping is not necessarily related to national defense. It would be an expansion of it. I would have no objection if you would strike that out and leave it out. I am not jealous of that at

all; but if we are going to cover it, we might also cover that very foul crime of kidnapping.

I can conceive of no more herinous crime than kidnaping. It is horrible.

Mr. KEATING. Of course, I share your views. I don't know that it is much more heinous, however, than selling narcotics to minors. There are crimes that particularly affect our consciences.

It was my thought in drawing H. R. 477 that we should confine it to those offenses which involve the national security, but that is something the committee will have to discuss.

Mr. CELLER. There is merit in that contention.

Mr. KEATING. The other and more fundamental difference is the one you have mentioned. My bill does provide for application to the court for an order, and the bill which has been sent up by the Attorney General, as well as your bill, provides that the Attorney General alone would have the authority to authorize this action.

Mr. CELLER. Off the record.

(Discussion off the record.)

Mr. KEATING. That is a troublesome problem.

It has been my feeling that it would give a greater measure of protection if that application to the court had to be made.

We are legislating here in a delicate field, as you recognize, and——

Mr. CELLER. How many district judges are there? About 225?

Mr. FOLEY. About that. Probably 315 in all.

Mr. KEATING. Yes.

Mr. CELLER. I think there are 225 judges, and with the circuit judges—your bill, I think, says a judge of any United States court.

Mr. KEATING. Yes.

Mr. CELLER. That would mean probably another 75.

Now, my ojection to that would be, as I indicated before, you would probably have about a hundred or so methods of doing this.

Mr. KEATING. Well, now, the informal inquiry I made about how it works in New York differs considerably from what you have told us. I had understood in New York these applications were largely made to particular judges, and I was told that when the application was made it was taken in by the district attorney, or someone in authority; it is in writing; the order explained to the court it was based on a short affidavit, and that then the judge signed it and locked it right up in his safe.

Mr. CELLER. That is what he should do.

Mr. KEATING. That, of course, is what should be done; and I would think the objection which you have raised regarding application of the New York statute arose rather from what would be pretty close to abuses on the part of the State courts rather than to the law itself.

Section 813 (a) of the New York Code of Criminal Procedure is very explicit in providing that such an order for the interception of communications may be issued by justices of the Supreme Court——

Mr. CELLER. Judge of the county court.

Mr. KEATING. Or the court of general sessions.

Mr. CELLER. And then go on. Go on further and see what it says.

Mr. KEATING (reading):

on the proof of an affidavit showing there is reasonable ground. * * *

Mr. CELLER. May I interrupt?

Mr. KEATING. Yes.

Mr. CELLER. "Upon oath or affirmation of"—whom?

a district attorney, or the attorney general, or of an officer above the rank of sergeant of any police department of the State, or any political subdivision thereof.

You see the many persons who can make the application.

Mr. KEATING. Well, that is true, and perhaps we should cover that in the wording of our bill, if we should decide to provide for the application.

I don't say this wording is necessarily right, but certainly courts should not, as you say, sign these orders in blank or in advance. It may be a convenience to someone who is in the district attorney's office, but it certainly is not weighing the validity of the application to handle it that way; and I think we would have to assume if we should provide for a presentation to the court that the judges of the district courts would do their duty, and I have felt that it was a rather wide authority to vest in the Attorney General.

I am very happy to have your views, but I would want to have strong evidence to disabuse my mind of the thought that we should give such wide authority to the Attorney General—not the present Attorney General, in whom I have the highest confidence, but in legislating, as everyone knows, we must try to meet a general situation. It does seem to me a wide authority to give him without any curb or check on that whatever.

Mr. CELLER. Even at the present time he can willy-nilly tap wires.

Mr. KEATING. Well——

Mr. CELLER. The FBI, I mean.

Off the record.

(Discussion off the record.)

Mr. KEATING. We can't know that.

Mr. CELLER. We can't.

Mr. KEATING. We can't take judicial or congressional notice of the fact that this thing goes on.

Mr. CELLER. Off the record.

(Discussion off the record.)

Mr. KEATING. I think at this point it might be well to insert in the record section 813 (a) of the New York Code of Criminal Procedure.

(Section 813 (a) of the New York Code of Criminal Procedure is as follows:)

SEC. 813–a. EX PARTE ORDER FOR INTERCEPTION. An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the State or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application

was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same.

Mr. KEATING. There is one other thing I would like to ask you about. The bill submitted by the Attorney General gives this power only to the FBI and eliminates all the other investigative agencies. Have you any views on that subject?

Mr. CELLER. I think it would be unwise to just limit it to the FBI. Since it is national defense, I think these other agencies might well participate in that right—the Director of Military Intelligence, Chief of Naval Intelligence, and so forth. After all, they are also vitally concerned with our national defense and endeavor to run down crimes involving espionage, sabotage, probably even more so in a certain sense than the FBI, although I don't want to diminish the importance of the FBI, which indeed is highly important in our system; but I think we should give that right to these other agencies.

Mr. KEATING. Mr. Crumpacker.

Mr. CELLER. Of course, there you would have the Attorney General only with the power to authorize.

I just want, if I may, to put in the record, just to get the record pretty well rounded out, two opinions—they were minority opinions of Justice Holmes and Justice Brandeis—wherein there is a claim that wiretapping is a violation of the Constitution. I don't agree with it, but I think it would be well to have that in the record.

Mr. KEATING. Well, should we——

Mr. CELLER. You want me to read it?

Mr. KEATING. For the record, also have the majority opinion?

Mr. CELLER. It might be well to put the Nardone opinion in.

What is the other opinion, Mr. Foley?

Mr. FOLEY. Nardone.

Mr. CELLER. Nardone, and what is the other case?

Mr. FOLEY. Weiss—W-e-i-s-s-.

Mr. CELLER. I think it might be well to put those two cases in.

Do you think so, Mr. Chairman?

Mr. FOLEY. They are quite lengthy opinions.

Mr. KEATING. Are they long opinions?

Mr. CELLER. Well, then, leave it out.

Mr. KEATING. We probably will print the proceedings, and I don't think we want them in the record.

Mr. CELLER. All right.

Mr. FOLEY. Perhaps, Mr. Chairman, we could just give the citations of those cases.

Mr. CELLER. Yes.

Mr. KEATING. Yes; I think we might give the citations.

Mr. FOLEY. The Nardone cases were 302 U. S. 379; 308 U. S. 338; the Weiss case was 308 U. S. 321.

Mr. KEATING. We appreciate your appearing here, Mr. Celler.

Mr. CELLER. Thank you.

Mr. KEATING. Mr. Willis has questions.

Mr. WILLIS. May I ask you a couple of questions?

Mr. CELLER. Yes.

Mr. WILLIS. Do you think—is it your idea—under your bill, the first part of which is quite similar to the Keating bill and then winds up differently, in that in the Keating bill a Federal judge must be consulted—by taking similar parts of the bill, is it your idea that the directors of the several agencies enumerated on page 1 would have to authorize the tapping in each instance in advance or that they, the agencies, would proceed under the rules prescribed by the Attorney General?

Mr. CELLER. You see, setting forth in the bill that there should be a specific tap, with reference to a specific person—if there is some general investigation they want to conduct, it would be idle to just limit it to one person through wires to be tapped; therefore, rather than to set forth all of those details in the bill, I think it is better to let the Attorney General promulgate his regulations to cover all those factors.

Mr. WILLIS. Well, now, in reading your bill and comparing it very hurriedly with the Keating bill, I notice that the first part of your bill, as does the Keating bill, provides that the different directors of the FBI, Military Intelligence, and so on, are authorized; then jumping to——

Mr. CELLER. They are authorized with the express approval of the Attorney General.

Mr. WILLIS. I understand. With the approval of the Attorney General——

Mr. CELLER. Yes.

Mr. WILLIS. To do what?

Mr. CELLER. To require——

Mr. WILLIS. That is on——

Mr. CELLER. Page 2, line 15.

Mr. WILLIS. Line 10.

Mr. CELLER. Yes; line 10—to require——

Mr. WILLIS. To require telegrams, cablegrams, and so on, to be disclosed and delivered.

Mr. CELLER. That is, to go to the Western Union and get those wires.

Mr. WILLIS. Right.

Then, starting on line 13, you have this language, not in the Keating bill:

> * * * or, upon the express approval of the Attorney General, to authorize their respective agents to obtain information by means of tapping—

And so on.

Mr. CELLER. That is the very nub of the bill.

Mr. WILLIS. And that is the very important difference, to my mind. There not only would the several directors have control, but then they might subdelegate that function to their agents.

Mr. CELLER. That is right.

Mr. WILLIS. Now, that is broadening it considerably.

Mr. CELLER. It is, and I thought about that. I didn't know how we could get around it.

I would prefer to have the authority limited to the heads of those bureaus, but how can you do that?

Mr. WILLIS. Well——

Mr. CELLER. I mean, you can't expect, in the conditions under which we live——

Mr. WILLIS. I was coming to the point of uniformity. Under those circumstances, wouldn't you have a greater disuniformity——

Mr. CELLER. No.

Mr. WILLIS. In the matter——

Mr. CELLER. The Attorney General——

Mr. WILLIS. In the promulgation of it by the various agents of the directors than you would by the hundred-and-some-odd Federal judges?

That is the point I wanted to ask you about.

Mr. CELLER. Yes. It is possible that interpretation is possible, but I hope there also that the regulations of the Attorney General would cover that.

I will say to the gentleman from Louisiana, I think there again I would hope that the regulations promulgated by the Attorney General would cover that. We have to rely a great deal on that; otherwise, you would have to pinpoint so many factors in the bill that you would have a bill 20 pages long probably. You couldn't cover everything. You have got to lodge power somewhere.

Mr. WILLIS. I know, but what is in my mind——

Mr. CELLER. Yes.

Mr. WILLIS. And I have an open mind on it——

Mr. CELLER. Yes.

Mr. WILLIS. Is that your point, to delegate authority in a Federal judge, in each instance——

Mr. CELLER. Well, you could——

Mr. WILLIS. Would make for nonuniformity. On the other hand, without that, it seems to me all these agents would have the bare pamphlets containing regulations and they, themselves, may be interpreting those regulations.

Mr. CELLER. Well, if you wish, you could tighten that language up and say "authorize them"—just the word "them" would mean the heads.

I have no pride of authorship there, and I only put "respective agents" in there because that is the way the bill came to me originally.

I thought about those words. I tried to weigh every word here, because it would have great meaning.

If you feel that is too broad, just substitute the word "them" for "respective agents" and then you would limit it to the heads.

Mr. WILLIS. Yes. I have no particular feeling about it right now.

Mr. CELLER. I understand.

Mr. WILLIS. I am inclined——

Mr. CELLER. We want to give and take here so we get the best possible bill.

Mr. WILLIS. I am inclined to agree we should perhaps limit ourselves to criminal law and not open up wiretapping in civil litigation, unless there are some strong reasons advanced.

Mr. CELLER. I didn't hear that.

Mr. WILLIS. I say I am inclined to agree with you, at least to begin with, we should limit wiretapping evidence to be admissible in criminal law——

Mr. CELLER. Yes.

Mr. WILLIS. Rather than the broad field of civil litigation.

Mr. CELLER. Sure.
Mr. WILLIS. Now, there may be reasons for that.
Mr. CELLER. Yes.
Mr. WILLIS. There may be reasons that I don't know about now.
Mr. FINE. I might point out to the chairman I don't quite agree with the second part of the language—that is, the language beginning on page 15 gives the agents the power to make up their own minds; but if you go back to the language, it authorizes the directors to authorize their agents to do a certain thing. It is the directors who have to authorize their agents, not that their agents have any power given unto themselves.
Mr. WILLIS. My point was, Would you not be giving these agents the choice?
Mr. FINE. The language doesn't do that; that is the point. I think the language only gives the power to the director to authorize his agents because you can't expect the director to go out and wiretap.
Mr. CELLER. Thank you very much.
Mr. KEATING. Anything further?
Thank you very much, Mr. Celler.
We are happy to have here this morning Mr. William Rogers from the Office of the Attorney General, representing the Attorney General, of the Department of Justice.
Mr. Rogers, we would be very happy to hear you.

STATEMENT OF WILLIAM P. ROGERS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. ROGERS. Mr. Chairman, members of the committee, I appreciate this opportunity to appear before your committee.
You have a number of bills dealing with the subject of wiretapping—H. R. 408, 477, 3552, and 5149. I appear in support of H. R. 5149, introduced by the chairman of the committee at the request of the Attorney General.
The bill provides that information obtained by the Federal Bureau of Investigation, through the interception of any communication by wire or radio, upon the express approval of the Attorney General, and in the course of any investigation to detect or prevent interference with or endangering of the national security or defense——
Mr. KEATING. May I interrupt, Mr. Rogers?
Mr. ROGERS. Yes, sir.
Mr. KEATING. Do you have a prepared statement?
Mr. ROGERS. Yes, sir.
Mr. KEATING. We haven't received that.
You probably prefer to complete your statement before being interrupted with questions.
Mr. ROGERS. Any way the committee prefers, Mr. Chairman.
Mr. KEATING. Proceed.
Mr. ROGERS. Very well. And in the course of any investigation to detect or prevent interference with or endangering of the national security or defense shall be admissible in evidence in criminal proceedings in the Federal courts. The bill thus deals only with a matter of procedure in that it relates merely to the admission in evidence of information obtained by wiretapping. As pointed out by the At-

torney General in his letter to the Speaker dated May 7, 1953, this proposal contains essential safeguards. He said:

> In the first place, its application would be restricted to investigations relating to the national security or defense. Secondly, wiretap evidence would be admissible only when obtained by the Federal Bureau of Investigation.
>
> Thirdly, wiretapping within the contemplation of the bill would require the express approval of the Attorney General.
>
> Finally, wiretap evidence would be admissible only in criminal proceedings in Federal courts.

I wish to emphasize the third safeguard mentioned by the Attorney General: that is, the requirement that before the evidence can be used in a case it must have been obtained by the Federal Bureau of Investigation upon the express approval of the Attorney General. The Attorney General is the Cabinet officer primarily responsible for the protection of the national security.

This duty, of course, extends throughout the entire United States, and is not limited to any particular district or area of the country. He is the officer of the Government in the best position to determine the necessity for wiretapping in the enforcement of the security laws.

Because the Attorney General is charged with the responsibility of law enforcement, it is our opinion he should be given the authority to use his judgment and discretion within constitutional limits to obtain evidence necessary to protect our national security.

I note that two of the bills before your committee, 477 and 3552, which, I believe, Mr. Chairman, are identical, provide that prior to acquiring or intercepting communications investigatory agents must be issued a permit by a judge of a United States court authorizing such acquisition or interception.

I might say there, Mr. Chairman and members of the committee, that I feel Congressman Celler expressed very clearly the views of the Department and all the previous Attorneys General by saying that he felt that this authorization should be given to the Attorney General and not to the court.

While such a provision on its face appears to offer safeguards, it contains flaws which become apparent on closer analysis. In the first place, as a practical matter, the courts would necessarily rely upon the Attorney General's recommendation in a particular case that the national security or defense required the permission to use the investigative technique of wiretapping.

In the second place, applications by the Attorney General to different district courts for permission would result not only in a diffusion of responsibility but would increase the likelihood of leaks.

I think Mr. Celler made the point very clearly—the possibility of leaks.

Moreover, security cases do not lend themselves to investigations on a limited area basis. They often extend through numerous judicial districts.

In that connection, it should be recalled that the Gold espionage network extended from New York to New Mexico, covering many points in between. The Attorney General and the FBI have responsibility for nationwide investigations and, in our opinion, should have the responsibility for making the decision about wiretapping in the national interest.

You will note that H. R. 5149, unlike the other bills before the committee, provides for wiretapping evidence to be admissible in Federal

courts only when obtained by the Federal Bureau of Investigation. Since the FBI is the only agency of Government charged with investigating offenses against the national security and defense for the purpose of prosecution, and since that agency is an arm of the Department of Justice, and therefore responsible and responsive to the Attorney General, H. R. 5149 has been limited to the FBI.

It is to be observed that H. R. 5149, in common with H. R. 408, permits the use of wiretap evidence obtained in the past provided such evidence was obtained upon the express approval of the Attorney General. This may make prosecution possible in certain cases where indictment has not been undertaken because evidence was obtained by wiretapping. This does not offend the prohibition against ex post facto laws, for the test as to whether a statute is ex post facto is not whether it changes the rules of evidence, but whether it authorizes a conviction upon less proof in amount or degree than was required when the crime was committed—and the leading case on that is Thompson against Missouri.

It should be emphasized that such a provision is not suggested with any particular prosecution in mind. Rather, such a provision would result in a reexamination of a number of matters which are or have been under consideration within the Department of Justice.

Since 1928, when the Supreme Court decided the case of Olmstead against the United States, it has been clear that wiretapping does not violate rights guaranteed by the Constitution.

Mr. KEATING. Say that again.

Mr. ROGERS. Since 1928, when the Supreme Court decided the case of Olmstead against the United States, it has been clear that wiretapping does not violate rights guaranteed by the Constitution.

The Communications Act of 1934 in section 605 provides in pertinent part that—

> no person not being authorized by the sender shall intercept any communication and divulge or publish the essence, contents, substance, purport, effect or meaning of such intercepted communication to any person * * *.

Beginning in 1937 there have been a series of cases in the Supreme Court relating to wiretapping, the result of which is that because of the provisions of section 605, wiretapping evidence is inadmissible in court proceedings. Evidence obtained as the result of leads secured by wiretapping is likewise inadmissible.

The Nardone case and the Weiss ease Congressman Celler referred to are in point.

In other words, Mr. Congressman——

Mr. WILLIS. That is the common-law rule now.

Mr. ROGERS. That's right.

The right of privacy should not be perverted into a license for unhampered conspiracy to overthrow the Government or to steal its secrets without possibility of punishment. The activities of espionage agents here, as well as in Canada and Great Britain, have done much to eliminate the technological lag of Soviet nuclear weapons production. The Attorney General in his letter to the Speaker pointed out that—

> It is quite unrealistic and thoroughly unreasonable that, though evidence is obtained showing clear violations of the laws against subversion, the hands of the prosecuting officers are tied and their efforts to maintain the security of the

Nation are thwarted. As the law now stands, the Government of the United States is under a serious handicap in protecting itself against spies, saboteurs, and others who are intent on interfering with or endangering national security.

Of the bills under consideration, H. R. 5149 is, in our opinion, best calculated to eliminate the serious handicap to which the Attorney General referred, and to afford to the people of the United States the assurance that every proper and constitutional step is being taken to protect the security of their country.

Mr. KEATING. Mr. Rogers, the bells have rung for a quorum call. Some of the members should respond to that. I have questions—I presume others have—regarding which we would like to get the benefit of your views. I suggest that we recess now for 30 minutes.

Mr. WILLIS. Mr. Chairman, I won't be able to come back. Could I ask one question that bothers me?

Mr. KEATING. Yes.

Mr. WILLIS. The bill provides that the evidence obtained as therein outlined—

shall be admissible in evidence in criminal proceedings in any court established by act of Congress.

Now, do I understand correctly that the criminal proceedings may be much broader than national defense?

In other words, the first part of the bill speaks of wiretapping information gathered in connection with detecting violation of national security, but it would appear from this bill that if, in the course of that tapping, some information is had in connection with any crime, collaterally to the primary purpose of the tapping, all that evidence may be used in any criminal prosecution.

Mr. ROGERS. No; that is not the purpose of the bill—and I see the point you have in mind. We thought——

Mr. KEATING. Shouldn't that be worded the way my bill is, "any criminal proceeding involving any of the foregoing violations in which the United States Government is a party"?

Mr. ROGERS. Well, I don't object to any language the committee wants to add.

I should say we don't object to any language the committee desires to add.

We do not think it advisable to specify the crime because you will find that there will be lots of cases in investigations involving national security or defense that may not fit a particular crime. It may turn out when you go to trial it won't be a trial for espionage; it will be a trial for arson. It will be clear that it involves the national security or defense, but it may be, in case of legal technicalities, your proof doesn't measure up to that.

You likewise may find you will have a crime of inciting to riot, which certainly was perpetrated by people trying to subvert the national security and defense.

Mr. WILLIS. On the other hand, suppose that the tapped information leads to the fact that the man conveying the information is involved in bootlegging——

Mr. ROGERS. As I say, in that case, if it has no relation——

Mr. WILLIS. Or kidnaping——

Mr. ROGERS. If it has no relation——

Excuse me.

Mr. WILLIS. Or extortion, or anything else, as a sideline, so to speak, then that information could be used in all criminal proceedings, as the bill reads, I am afraid.

Mr. ROGERS. Well, we didn't intend it that way, but I hate to limit it to any particular crime.

Mr. WILLIS. I see.

Mr. KEATING. The committee will recess for 30 minutes.

(Whereupon, at 11:15 a. m., the hearing was recessed, to reconvene at 11:45 a. m.)

(The hearing reconvened at 11:48 a. m.)

Mr. KEATING. We will come to order.

Did you complete your statement?

Mr. ROGERS. Yes, Mr. Chairman.

I might, with your permission, make a few observations about the last matter we were discussing.

We would have no objection to appropriate language to make it clear that wholly unrelated crimes like Mr. Willis suggested—bootlegging or something—not be permitted. On the other hand, we do recognize the real danger in trying to set forth the crimes because very often an investigation turns out to develop proof of another crime—arson, perjury, or something—which clearly involves the national security or defense, but may not have been named in the bill; and, for that reason, we would hate to have that limitation in our bill.

Mr. KEATING. In other words, you wouldn't want it limited to the specific violations spelled out in the bill?

Mr. ROGERS. That is right, Mr. Chairman; but we do think the violations should be related to national security and defense.

As I say, I can conceive of situations where an investigation would clearly show that persons were engaged in sabotage, but the proof might not be quite such to proceed on the sabotage case, but you had a good case on arson. Well, in that event, it would be unwise, it seems to me, to tie the hands of the Department of Justice in prohibiting the use of evidence obtained by wiretaps in the arson case; and there are a lot of other examples you could think of.

Mr. KEATING. You don't have any specific language which you would suggest to cover that limitation?

Mr. ROGERS. Well, I think that probably the legislative history of the act, if it is passed, would be important. You might have language something like this—"but only in cases involving national security or defense," or "only in cases arising out of such investigations"—some such limiting language like that—to make it clear that it was not to be used in unrelated offenses.

Mr. CRUMPACKER. Is the FBI the only Federal investigating agency which deals with national security?

Mr. ROGERS. No; but they are the only investigating agency which is charged with the development of information for the prosecution of offenses involving the national security.

Mr. CRUMPACKER. If the intelligence divisions of one of the military services uncovered some act of espionage, or something of that sort, the prosecution would still be conducted by the Department of Justice, would it not?

Mr. ROGERS. That is correct, but I think you will find, as a practical matter, that as soon as any agency, other than the Department of Justice, has any facts brought to its attention by the crime you sug-

gest, they are immediately turned over to the FBI, and from that point on the investigation is conducted by the FBI.

Mr. CRUMPACKER. Well, suppose, for an example, that the FBI was never able to obtain any evidence sufficient to obtain a conviction on its own after some other investigative agency had uncovered some such evidence; what would you do then?

Mr. ROGERS. Well, I'm not sure I understand your question.

Mr. CRUMPACKER. Well, some of these other bills here propose to make it possible for the FBI, the Military Intelligence Division of the Department of the Army, the Director of Intelligence, United States Air Force, and the Chief of the Office of Naval Intelligence of the Navy Department to conduct wiretapping investigations.

Mr. ROGERS. Well, if you don't mind, I think I see a point, and that's just—if you don't mind, for a moment—consider it as a practical matter.

Suppose that the Chief of the Office of Naval Intelligence of the Navy Department wanted to operate under H. R. 477. As I understand it, they would first have to get the approval of the Attorney General.

I think that's right, isn't it——

Mr. CRUMPACKER. Yes.

Mr. ROGERS. As I understand the bill.

Now, right at that point, if they had information showing there was a possible violation of national security or defense, they would bring it to the Attorney General's attention—the matter from that point on would be investigated by the FBI, and the wiretap would be made by the FBI, because, under the law, the Department of Justice has the responsibility for developing cases involving prosecutions under the national security and defense.

Mr. KEATING. Suppose it involved—if you just let me ask a question right along that line—the discipline of some member of their own forces?

Mr. ROGERS. Well, I don't think that——

Let's see if I understand your question. Are you thinking of a case where a member of the Armed Forces is engaged in espionage or sabotage?

Well, it is my understanding that, in this case, the FBI would conduct the investigation probably in conjunction with the Army or the Navy, but certainly if there was evidence given to the Navy that someone in the Navy was engaged in espionage or sabotage, and under this bill, 477, they came to the Department of Justice and notified the Attorney General to that effect and wanted permission to tap the wires, the Department of Justice would have to proceed from that point on because we have the primary responsibility for enforcing laws.

Mr. KEATING. Well, what if they were seeking to get evidence which might form the basis of disciplinary action within the armed services?

That prosecution, punishment, might take place, might it not, within the branch of the service itself rather than being turned over to the Attorney General for prosecution?

Mr. ROGERS. Well, I suppose there are disciplinary actions that might be of that type; but I think if it reached the stature of espionage or sabotage, anything that directly related to national defense, as

distinguished from disciplinary action, the Department of Justice would be under a statutory obligation to proceed.

Mr. KEATING. Well, the crimes listed are rather broad—all of them, however, involving the national security—and I am not sure where the line is drawn there.

We are going to hear the representatives of the armed services. It may be they would feel the FBI is the only agency that needs this authority, but it strikes me, offhand, it might be needed by the intelligence departments of the various branches of the armed services.

Mr. ROGERS. Well, I might say, Mr. Chairman, we don't have a strong feeling on that point, and I don't want to convey that impression to the committee.

I do think it's important for the future, whichever bill the committee sees fit to report out, that we limit this as much as possible because there may be considerable opposition to it; and the Department's position is that we're most anxious to have the bill simple enough so that we can proceed in these matters of extreme importance involving espionage and sabotage and would hate to have anything included in the bill which was not of major importance, which might weaken the possibilities of passage——

Mr. KEATING. Well, the——

Mr. ROGERS. But we don't have any——

Mr. KEATING. Possibilities of passage would be probably considerably weakened by giving this entire power to the Attorney General rather than having an outside tribunal, like the court, pass on it.

Now, that may be necessary, but we have to measure the advantages of a bill strong enough to do the job against a bill with the possibilities of opposition.

Mr. ROGERS. Yes.

Well, I appreciate that, Mr. Chairman.

Mr. KEATING. It doesn't occur to me, offhand, it would increase the opposition to a bill to give this power to the recognized intelligence departments of the various armed services, any more than to give the sole authority to the FBI.

I don't have any preconceived——

Mr. ROGERS. Well, another thought in that connection, Mr. Chairman, that occurs to me is this: Where do you draw the line?

I notice the Atomic Energy Commission is not given the authority or CIA is not given the authority.

Mr. KEATING. I don't know as the Atomic Energy Commission has an intelligence unit. Maybe they do.

Mr. ROGERS. I believe——

Mr. KEATING. Do they?

Mr. ROGERS. I believe so, Mr. Chairman. I am not sure.

Mr. KEATING. Well, we will have to look into that.

Excuse me, Mr. Crumpacker. I interrupted you for that question.

Mr. CRUMPACKER. As a practical matter, does the FBI conduct investigations on military establishments or do the military services conduct them, themselves, within their own intelligence agencies?

Mr. ROGERS. Well, I am not sure of that, Mr. Crumpacker. I think that probably generally the FBI does not conduct them on military establishments; but I would have to check on that.

I feel sure if it was a crime involving espionage or sabotage—one of the important crimes—that the FBI would, in any event—I know,

from my own experience in the matter, as a practical matter, on small disciplinary matters the FBI would not. They would be handled by the Army, the Navy, or the Air Force.

Mr. ROGERS. But on these major things, I am not sure.

Mr. CRUMPACKER. It is my own recollection, from my own service in the Army, that the Army Intelligence investigated everything on military installations, including suspected espionage.

Now, there may have been further investigations by the FBI in progress that I had no knowledge of.

Mr. ROGERS. Well, I think that is probably correct.

But it was my thought that—suppose the investigation of espionage is made by the Army or the Navy, and at some point along the line they think it is developed—at that point they go to the Attorney General and ask for permission to have their matter presented to the court. Now, I think at that point the Attorney General would be under some obligation to proceed himself.

Mr. CRUMPACKER. Well, the point I was trying to make a while ago was: Suppose, for example, Army Intelligence may tap a telephone on some military installation and gain evidence of some act of espionage; then they notify the FBI but the FBI is never able to get any concrete evidence on this particular individual. Would you not, then, face the possibility of not being able to obtain any conviction because, under your recommended bill, any evidence obtained by the Army through wiretapping would not be admissible in the trial?

Mr. ROGERS. Well, I don't think, if I understand you correctly, that the facts as you have outlined them would have occurred, because, as I understand it, before the tapping takes place, they have to come to the Attorney General and get his permission.

As I understand your question, you suppose the Army makes the wiretap first, without any permission—and in that event it wouldn't be admissible in any of these bills.

Mr. CRUMPACKER. That is correct.

It wouldn't be admissible under H. R. 5149. As I understand these other bills, they would authorize the military-intelligence agencies to conduct wiretapping on their own after following proper procedures.

Mr. ROGERS. Yes; but not until the matter had been called to the Department of Justice's attention.

Mr. CRUMPACKER. I am assuming what Mr. Celler, for example, was assuming here earlier today—that a lot of this wiretapping is going on at the present time without any statutory authorization, and it might possibly continue to go on, even after the enactment of some legislation, particularly inasmuch as H. R. 5149, as I read it, does not provide any penalty for any unauthorized——

Mr. ROGERS. That is correct.

Mr. CRUMPACKER. Wiretapping.

Mr. ROGERS. That is correct.

Mr. CRUMPACKER. Don't you think there might be some hazard involved in restricting it as closely as the H. R. 5149 does?

Mr. ROGERS. Well, unless further testimony develops that there are cases where the Military Establishment would have exclusive authority to investigate these cases involving national security, defense, then our present position is that it should be limited to investigations conducted by the Federal Bureau of Investigation because, as I say, it

seems to me in any case where the Military Establishment calls to the attention of the Department of Justice facts which would justify wiretapping—in that event, the Department of Justice would be under obligation to then proceed itself, and anything less than that would not be admissible, anyway, under any of these bills.

In other words, if the Army made the wirettap first and obtained evidence, and then came to the Department of Justice, to try to get the Attorney General to go to court to get permission, it would be too late. That evidence wouldn't be admissible in court, anyway, as I understand it.

Am I right in that, Mr. Chairman?

As I read the bill, it says—477 says:

Provided, That, prior to acquiring or intercepting the communications from which the information is obtained, an authorized agent of any one of said investigatorial agencies shall have been issued a permit—

and so forth.

So, nothing they obtain prior to that time is admissible, anyway.

Mr. CRUMPACKER. The position of the Department is definitely opposed to extending to any of these other Federal intelligence agencies; is that correct?

Mr. ROGERS. Well, as I said earlier, we are opposed to it because we don't think it's necessary, and we think it is more advisable to have the FBI do it.

We're not inflexible on it. If it develops on in further testimony here that there is a substantial need for it, we certainly wouldn't oppose it.

But our present position is that it is not needed, and we think it is better to have the FBI do it.

Mr. CRUMPACKER. That is all.

Mr. KEATING. The most important difference between the recommendation of the Attorney General and H. R. 477 seems to be this question of whether application should be made to court or whether this power should rest only in the Attorney General.

There is, of course, also the very important difference that in the recommendation to the Attorney General there is no provision about penalties for illegal action in this field.

I want to ask you a few questions about those two differences between the approach of the Attorney General and the approach in H. R. 477.

You had some experience in the prosecutor's office in New York, and at that time was section 813 (a), the law which was amended by the laws of 1942—I don't remember whether you——

Mr. ROGERS. I think I was, Mr. Chairman. I was in that office both before and after the war. I have forgotten the particular section, but I know we did operate under a statute which permitted it, and I do have some experience with it.

Mr. KEATING. Did you yourself have any specific experience under it?

The point I am leading up to is: I think it is important for us to find out what the experience has been under it.

I have been firm about my approach, which is initially to feel it is desirable to have this added safeguard in the application to the court. However, I might be convinced otherwise were I sure there was no

way of handling it without leading to abuses in the way of breach of security.

What experience, if any, did you have in that regard when you were in the prosecuting office in New York?

Mr. ROGERS. Well, I had some experience with it, Mr. Chairman. My experience was limited to handling several applications, ex parte, and I have no recollection of how many, by which we obtained permission to tap wires; and I also tried cases involving situations where wiretaps had been obtained. In other words, I have tried cases where we used the wiretaps pursuant to the court order.

My first reaction to it was the same as yours.

I think that anything we can do to provide safeguards in this field is advisable.

In New York, of course, I think the committee should bear in mind that the situation is not at all analogous to the one we're dealing with here. In the first place, my recollection is that it covers all crimes—both felonies and misdemeanors—so that you have a raft of crimes, bookmaking, prostitution, all sorts of things, which are covered by it; and if you didn't have some safeguard I suppose, because of the wide nature of the crimes involved, you would have the possibility of serious abuse.

The second and important difference is that in New York each county has its own prosecutor, so that you have each county—if you left it up to the district attorney in each county, you might have serious abuses.

In this situation that we're dealing with, we're dealing with crimes involving the national security or defense only. Secondly, we're dealing with the chief law enforcement officer of the United States.

If any of these bills provided that each United States attorney had the right to make that decision, I'd certainly be against it; but somewhere along the line, when you're dealing with national security, you have to trust somebody and it seems to me that the proper party to trust is the Attorney General of the United States.

I want at this point to say that I disagree with one thing Congressman Celler said. He indicated that the Attorney General might delegate this power.

As I read the law, or the proposed bills, this would be a power that he couldn't delegate because it says express permission, as I recall it.

Mr. KEATING. Express approval.

Mr. ROGERS. Yes; and we certainly intend that that means that the Attorney General, himself, has to pass on this in each instance.

Now, if I may proceed for just a moment along that line: Assume that the Attorney General is required to go to court, to district court, before he can get permission to do this. Certainly it couldn't be expected that the Attorney General would have to disclose to the court the real facts of the case. In the first place, the court wouldn't want it; and certainly I don't think it would be advisable in the interests of the country.

Even within the Department of Justice when we have a matter like this we only tell the people that need to know. We don't tell anybody else, because the more people that have this type of information, the greater danger there is of a leak.

So, as a practical matter, the court would probably take the recommendation of the Attorney General, which would be in rather general form. Probably it would be something to this effect: "The Attorney General certifies that he has information which he feels indicates that the national security or defense may be violated and that he feels certain wires should be tapped."

I know that that's the way it's done in New York. The affidavits aren't very factual. They're just general in nature, and I don't recall any difficulty in getting the permission of the court. My own experience is that it's pretty easy.

Mr. KEATING. What does the court do? Aren't those applications and the orders sealed up and placed in a safe, or are they public property?

Mr. ROGERS. I don't recall, and I don't believe there's anything you could do, Mr. Chairman, that would guarantee that anything could be sealed up and kept from anybody else's eyes. I think with all the judges we have throughout this country you couldn't make any provision that would guarantee absolute secrecy Judges have secretaries whom they trust; they have court clerks whom they trust, and I think the safeguard that you provide is illusory. I just don't think it exists. I think, as a practical matter, the courts would go along with the Attorney General.

On the other hand, I think you would open up very serious possibilities of a leak, and I think if you talked to people off the record in New York State, if you talked to police officers or others who have had experience in this field, you would find that is a serious problem in New York State.

Mr. KEATING. Well, we hope to have some representatives from the bar or the prosecuting agencies in New York appear before us.

Mr. ROGERS. Well, as I say, I think the idea is a good one. I think the safeguards are fine.

I think in this field of national security, when you require the Attorney General to expressly do it by his own act, that that is sufficient safeguard.

And I was interested to hear Congressman Celler say that's been the consistent view of the Department of Justice under both administrations.

Mr. KEATING. Well, it is natural for any cabinet officer—that is why we have the coordinative branches of the Government—to oftentimes feel that it will expedite matters if he has the sole control of it, and that isn't a political matter. It is a matter inherent in the administration of the executive side of the Government, which you will always encounter.

The problem for this committee is to weigh the protection which is afforded against abuses, which, it strikes me, is somewhat greater if the application to the court is made as against the structure of the whole thing we are seeking to accomplish.

If the information were going to be made public so that the person under investigation was going to know about everything that was going on, of course, there would be no point in any legislation at all——

Mr. ROGERS. That is right.

Mr. KEATING. And the primary purpose of introducing legislation was to meet a serious problem that our country faces in these disloyal characters' operations.

You feel the application to the court would throw such a cumbersome burden upon the Attorney General that you would rather not see any bill than a bill with such provision?

Mr. ROGERS. No; I do not, Mr. Chairman. I do not. I mean, if it comes down to a question of whether we can have a bill passed, and we have to get permission, certainly we would prefer that.

I think, though, that when you're dealing with the subject of national security and defense, and you're dealing with the chief law-enforcement officer of the United States, there's no reason to suspect he will misuse that power.

If this applied to other crimes, all crimes, other purposes, then I'd certainly think that—well, put it another way: My attitude would certainly be changed; but in this one field, where the possibility of a leak can destroy the whole thing, the fewer people that know about, the better; and, as I say, I don't believe it's any added safeguard.

I'm not sure how the bill would work. I'm not sure if you have a ring, an espionage ring, whether you would have to get permission from each court where the tap was made in that district.

Suppose there were 10 people throughout the country. Would you have to go to each district court?

And, if you did, you would have 10 judges that knew it; you would have probably their secretaries that knew it.

I don't know of a judge—well, I shouldn't say that—but I think, by and large, the judges' secretaries know what's happening.

Mr. KEATING. I don't believe, to answer your specific objection, that would be necessary under the wording of H. R. 477. It says any judge—a judge of any United States court. I would think one judge would sign an order relating to all the members of a ring, even though the operations were not all in the realm of his district because this is, of course, an ex parte application.

Mr. ROGERS. Yes. Well, I wasn't clear. It seemed that way to me, Mr. Chairman.

Mr. KEATING. Of course, I think, in most cases, the court would take the view of the Attorney General; and if he were going to do so in all cases, your argument is that really doesn't add a safeguard.

We have to assume, I think, the independence of the judiciary, and some judges that I have appeared before have asserted that independence with considerable force, and——

Mr. ROGERS. I guess we've all had that experience, Mr. Chairman.

Mr. KEATING. I think most of us have.

The point is made: There would not be a uniformity in application, and I think probably that is true; but, rather than being an objection, that perhaps is an argument for the application to the court. It would be of little value were it to become a stereotype proceeding.

I think a good many judges would inquire into the merits of the application rather fully before they granted the authority.

I would like to return to this other point about the imposition of penalities for unauthorized or illegal wiretapping.

Would you present your views on that and the reason for not including that in the bill which you submitted?

Mr. ROGERS. Well——

Mr. KEATING. Of course, your bill really is designed only to meet the question of the use of the evidence.

Mr. ROGERS. That's right.

Mr. KEATING. How do you feel about the imposition of penalties for unauthorized interception of communications?

Mr. ROGERS. Well, let me just speak personally for a moment.

I am very much opposed to unlimited and unwarranted wiretapping, and I think probably it's been abused, although I don't know that of my own knowledge. Things I have heard indicate that, and I think that some considerable study and care should be given to that subject, and if appropriate legislation can be worked out, which would prohibit so the line of demarcation could be clearly drawn, we'd be inclined to be for it.

The difficulty now is that the law is so nebulous that it's very difficult to obtain successful prosecutions under it, and we'd have no objection to that at all.

I do think, though, that if we can avoid tying it up here we'd prefer it because—I mean tying it up with this bill. I think the committee would want to make a pretty careful study of that, because I can imagine agencies like the Atomic Energy Commission and CIA and others might have views that they would wish to express on it. I just don't know enough about that subject to know.

Certainly as to other wiretapping generally, I am very much opposed to it; and we would like—if we had a clear-cut law, we certainly would proceed against wiretappers.

Mr. KEATING. It would seem to me that it would be appropriate to deal with this problem in a single piece of legislation, because I do want to stress what Congressman Celler said: That the purpose in mind, I believe, of the authors of all these bills is definitely twofold:

(1) To lay down the narrow class of cases in which this wiretapping will be permitted and the very definite procedures which must be followed to obtain permission; and

(2) On the other hand, to say, after those lines have been laid down, anybody that steps outside those bounds is going to face stiff and severe penalties.

And I think it would facilitate the passage of the legislation to have both of those problems at a single time, regardless of the language of any particular bills before us.

In any event, you do not oppose in principle dealing with that side of the problem; it is only a question in your mind whether it should be tied up in a single bill?

Mr. ROGERS. That is correct, Mr. Chairman; we agree with it in principle. We think it is a matter of legislative policy.

Frankly, I don't know enough about the subject in the other departments and agencies of Government to want to express an opinion on it, but——

Mr. KEATING. We are anxious——

Mr. ROGERS. I agree with the chairman in principle.

Mr. KEATING. We are anxious to hear as many of them as we can.

Mr. Fine, did you have questions?

Mr. FINE. No questions.

Mr. KEATING. I don't know whether we obtained your views on the subject, or question, whether this permission to intercept communica-

tions and then introduce the evidence in court should be limited only to offenses directly or indirectly involving the security of the country or whether it should be widened, as it is in Mr. Celler's bill, to laws involving the safety of human life.

Mr. ROGERS. Well, Mr. Chairman, I think the colloquy between you and Congressman Celler pretty much expressed our views on it.

We think it is of primary importance that we get some legislation in this field of national security, because it's so important to every one of us today.

If you start to make distinctions between other kinds of crimes, it's rather difficult. As you pointed out, kidnapping is a serious crime and we all feel very strongly about it; but so is selling narcotics to minors.

We certainly have no objection to the extension to include kidnapping; but I think, though, maybe the first step ought to involve just the national security and defense.

Mr. KEATING. It strikes me that way, offhand, and if the law then is not abused, it might be desirable to consider extension to other specified crimes. But I would feel that, in any event, if we were going beyond those designated involving national security, the language "those involving the safety of human life" is too broad and that we should get beyond that and spell out the specific offenses which we are going to have covered by the legislation.

Mr. ROGERS. Yes; I certainly agree with that.

Mr. KEATING. Mr. Foley, do you have questions?

Mr. FOLEY. Yes, sir.

Mr. Rogers, have you given any consideration to the practical trial aspect that might arise under your bill in laying the groundwork for the admission of this evidence?

As I see it, you have two conditions:

(1) The express approval of the Attorney General; and

(2) The information was obtained during the course of investigation involving national security.

Mr. ROGERS. That's right.

Mr. FOLEY. And realizing that one of the most frustrating aspects of national-security prosecutions, it is just how much evidence you want to reveal in open court.

But now, as I read your bill, you are going to have to lay a groundwork and show some evidence.

Mr. ROGERS. Yes.

Mr. FOLEY. You know, under trial practice, once you open the door, how far the defense is able to go on cross examination——

Mr. ROGERS. Yes.

Mr. FOLEY. And that practical problem, I think, is obviated under Mr. Keating's bill, 477, because, from experience in the prosecutor's office, you merely put in the court order and that would end it. There would be no question about the evidence that sustained it, because it was a discretionary act on the part of the judge.

Mr. ROGERS. Well, I think that is a good point.

It was our thought on that that the decision would be made by the court at the time, just the way it is in the first instance in New York. In other words, rather than give the court that information and create this possibility of disclosure, you do it with the same thing at trial—have the court decide it. I don't think under the statute the defense

lawyer would be entitled to it. The judge could just look at the papers and decide whether the statute was complied with by the Attorney General and, if so, admit the evidence—admit the wire-tapping evidence.

Mr. FOLEY. Yes; but don't you think he would have good grounds to object to its admission on the basis that it wasn't relevant under the statute?

Mr. ROGERS. That it was what?

Mr. FOLEY. That it was not relevant; that the information was not obtained during the course of an investigation involving national security.

Mr. ROGERS. Well, yes; if he thought that was the case. That is why I say——

Mr. FOLEY. And you know the extremes they will go to in that case. That is the thing that bothers me—the practical problem of the extent to which defense counsel will go.

Mr. ROGERS. I would rather take that risk rather than the risk of leak before time because one leak can destroy the whole investigation. You can have months of work destroyed by telling one person, and the FBI uses extreme care in these matters to prevent that.

Mr. FOLEY. That is all, Mr. Keating.

Mr. KEATING. Mr. Fine.

Mr. FINE. Mr. Rogers, I was interested—I assume that page 4 of your statement referring to the use of wiretap evidence obtained in the past was tied in with line 5 of the bill—that is, heretofore received——

Mr. ROGERS. That is correct.

Mr. FINE. Or heretofore obtained——

Mr. ROGERS. That is correct.

Mr. FINE. And I am a little concerned as to the fact, even though you do say that the provision doesn't suggest any particular prosecution at the moment——

Mr. ROGERS. Yes.

Mr. FINE. To say it would give you the opportunity to reexamine a number of cases. Do you know those matters you have in mind, or would you care to tell us?

Mr. ROGERS. I don't know, and I don't think I would be at liberty to discuss them if I did.

Mr. FINE. Well, I am concerned about going back in the past in matters of this sort. I can see if we laid down a rule it might be all right for the future, but why resurrect the past for purposes of——

Mr. ROGERS. Well, I want to respectfully disagree with you there. I think it is most important, if we have evidence in our files which show that people now in this country have engaged in espionage, sabotage, or some other crime, and we can't—and the statute of limitations hasn't run, and we can't prosecute those members just because we have a rule of evidence which prohibits the introduction of this in evidence—my personal feeling is that we're being very unrealistic as a nation not to prosecute them. That is one of the things that makes me about as mad as anything I know, Mr. Congressman.

Mr. FINE. You limit yourself by saying only if it is obtained with the express approval of the Attorney General.

Mr. ROGERS. That's right.

Mr. FINE. Well, who is to prove that?

Mr. ROGERS. Well, that's been done.

Mr. FINE. How do we know?

I mean, you are asking the Congress now——

Mr. ROGERS. Well, when I——

Mr. FINE. To sanction or approve the resurrection of litigation without telling the Congress specifically what you have in mind, No. 1, and what evidence—and whether or not the evidence has been obtained with the express approval, and what evidence has been obtained.

Mr. ROGERS. Well, I think in that connection that certainly we couldn't proceed unless we had—when we talk about express approval, we mean the written approval of the Attorney General, and we could only proceed in those cases.

Now, it's no secret—in fact, it's been testified to a number of times by our predecessors—that that practice has been in effect in the Department of Justice and that's a matter of common knowledge, both before Congress and in the courts.

Mr. FINE. What I was emphasizing is that here we are sitting and we are asked to pass upon certain types of legislation to give you a blank check. If that's what you want, just say it.

Mr. ROGERS. No; I don't——

Mr. FINE. Isn't that what you are asking that we give you?

Mr. ROGERS. We don't want any blank check at all.

Mr. FINE. If you don't want a blank check, what do you want?

Mr. ROGERS. What we are asking in that regard is: If the Department of Justice now has evidence in its possession, which was obtained after express approval by the Attorney General, as a result of wiretapping, and we can proceed in court, with all the judicial safeguards provided in this country, to prove that a person was engaged in espionage, and the statute of limitations has not run, we feel that just good commonsense dictates that we proceed.

We've got to comply with all the court rules, and we've got to prove our case beyond a reasonable doubt; and the defendant has all the safeguards which we provide under our system of constitutional law.

So, we certainly don't think it's a blank check that we're asking for.

Mr. FINE. Well, certainly a blank check with respect to information that we, ourselves, don't know anything about, and we are asked to give the power to use the evidence you now have in your files in litigation which may be suspended at the moment.

Mr. ROGERS. Only in a very limited field—national security and defense.

Mr. FINE. Well, we don't know——

Mr. ROGERS. Well, that——

Mr. FINE. As Mr. Willis points out, any criminal case——

Mr. ROGERS. Well, I guess you were not in the room when we had that discussion. We're perfectly willing to limit it to matters involving national security and defense. Before you came in we discussed that, and I made it clear we had no objection to that limitation.

Mr. KEATING. Would that give you the authority under the wording of your bill to introduce in court evidence obtained by wiretapping in any case in which an indictment has already been found, or would it apply only in a new indictment?

Mr. ROGERS. I think it would probably apply to both.

I might say, Mr. Chairman, we haven't reviewed this with the idea of proceeding in any particular case. I made that clear, I think, in my statement, but I think it would apply to both.

Mr. KEATING. Your feeling is that it would not be subject to objection as being ex post facto legislation because it would have to do only with the rules of evidence?

Mr. ROGERS. That's correct.

Mr. KEATING. It wouldn't have to do with defining the nature of the original crime which was alleged to have been committed?

Mr. ROGERS. That's correct.

In this case I cited there was a prosecution for murder. They tried the case first and they didn't get a conviction because the person had written out the prescription for strychnine in his own handwriting, and in that day you couldn't offer handwriting-expert testimony; and after the trial, before the second trial, the law was changed to permit the introduction of that handwriting testimony and, as a result of that, obtained a conviction. The Supreme Court said that was not ex post facto.

Mr. KEATING. Anything further? Thank you very much, Mr. Rogers.

Mr. ROGERS. I thank the committee very much.

Mr. KEATING. You have been very helpful. The committee will recess at this time until 2 o'clock.

(Whereupon, at 12:40 p. m., the hearing was recessed, to reconvene at 2 p. m.)

AFTER RECESS

Mr. KEATING. The committee will come to order. It is unfortunate that we have these interruptions.

The next witness is Mr. Rosel H. Hyde, Chairman of the Federal Communications Commission.

Mr. Hyde, we are glad to have you here, and happy to hear you.

STATEMENT OF ROSEL H. HYDE, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D. C.

Commissioner HYDE. Mr. Chairman, my name is Rosel H. Hyde, and I am the Chairman of the Federal Communications Commission. I sincerely appreciate the opportunity to testify before you concerning these important bills dealing with the interception of communications.

The bills which you are presently considering all relate to the existing prohibitions in section 605 of the Communications Act against the interception of private communications by wire or radio. Each of the bills would have the effect of modifying the existing prohibitions in section 605 to authorize interception of private communications by representatives of specified agencies of the Federal Government in the course of investigations involving possible violations of law relating to the national security or national defense.

The Commission has prepared and submitted to your committee comments on these bills consisting of a rather detailed analysis and discussion of the provisions of the several proposals and the extent to which their enactment would change the present Communications Act. The basic policy questions raised by the proposals, however—whether it is necessary in the interest of national security to authorize

the specified agencies to intercept private communications and the specific safeguards which should surround any such authorization—are questions concerning which we have very little information, and we are not in a position to make a recommendation. We, therefore, are neither supporting nor objecting to the enactment of any of the bills.

We do agree, however, with the apparent objective of section 6 of H. R. 408 in attempting to clarify the existing prohibitions on the interception of messages by persons other than those who might be expressly authorized to intercept such messages. As the Commission has pointed out in its more detailed comments, the present language of section 605 of the Communications Act is far from clear. And this has led to a considerable amount of confusion as to whether unauthorized interception of a message is illegal per se, or whether it is only illegal where the information secured thereby is publicly divulged or used in a subsequent court proceeding. This is not an easy question or one which too readily lends itself to legislative draftsmanship. Thus, no one would suggest that it should be a violation of law for a person going out of town to authorize his secretary to open any telegrams which might come for him and take any emergency action that might be required. On the other hand, it seems equally clear to us that it was not the intent of Congress in adopting the present language of section 605 to permit outside parties to intercept private radio or wire communications and use them for their own ends and to the possible detriment of the parties to the communication.

We have pointed out in our detailed comments some of the questions which are raised by the existing language of the Communications Act and some of the problems which might result were the specific language of H. R. 408 to be enacted into law. And we have advanced for the consideration of your committee a possible way of taking care of these problems.

We do not wish to take the time of the committee on the details of the various proposals. We do offer, however, the assistance of our lawyers, our staff people, and the Commissioners themselves, for any assistance that we might be able to give the committee.

Mr. KEATING. This document, headed "Comments of the Federal Communications Commission on H. R. 408, H. R. 477, and H. R. 3552, Bills To Authorize Acquisition and Interception of Communications in the Interest of National Security and Defense," are the comments to which you refer, are they?

Commissioner HYDE. Yes, Mr. Chairman.

Mr. KEATING. And you suggest that these be made a part of the record at this point?

Commissioner HYDE. Yes. We believe that they may be helpful to the further study of the legislation. And if there are any questions that arise from examination of that analysis material, or any other services we could possibly offer in connection with your study of this matter, we would be pleased to be called upon, of course.

Mr. KEATING. Was this prepared by you just recently?

Commissioner HYDE. It was. But, Mr. Chairman, it does include a substantial amount of material from comment that has been submitted on previous occasions when there have been bills directed to this subject matter.

(The document referred to follows:)

COMMENTS OF THE FEDERAL COMMUNICATIONS COMMISSION ON H. R. 408, H. R. 477, AND H. R. 3552, BILLS TO AUTHORIZE ACQUISITION AND INTERCEPTION OF COMMUNICATIONS IN THE INTEREST OF NATIONAL SECURITY AND DEFENSE

The provisions of H. R. 477 and H. R. 3552 are virtually identical. Each of these bills would authorize certain named officials of the United States Government, under rules prescribed by the Attorney General, to require that telegrams, cablegrams, radiograms, or other wire or radio communications be disclosed and delivered to any authorized agent of one of the Government investigatorial agencies named in the bill. Each also provides that, with the express written approval of the Attorney General, information obtained by intercepting or recording telegraph, telephone, cable, or radio communications, shall, without regard to the limitations of section 605 of the Communications Act of 1934, be disclosed and delivered to such named officials. The authority which would be given to the officials named would be used only in connection with investigations to prevent any interference with national security and defense by treason, sabotage, espionage, sedition, conspiracy, violations of neutrality laws, violations of the act requiring the registration of agents of foreign principals, violations of the act requiring the registration of organizations carrying on certain activities within the country, "or in any other manner."

The bills provide that information obtained in the manner authorized by this statute shall be admissible in evidence in criminal or civil proceedings in which the United States is a party provided that prior to acquiring or intercepting any communication, a permit has been issued by a judge of any United States court authorizing the acquisition or interception of the communications. A judge of any United States court would be required to issue such a permit upon application of an agent of one of the named investigatorial agencies if the judge is satisfied that there is reasonable cause to believe that the communications in question may contain information that "might assist in the conduct of such investigation."

There is also a provision in subsection (c) of these bills which would require all persons to comply with the requests of persons duly authorized under the statute, to disclose and surrender any radio or wire communication in his possession or control. Another provision, in subsection (d), would prohibit any person from divulging or using the existence or contents of any information obtained pursuant to the provisions of the proposed statute except for the purposes provided in the statute. Finally, the bills contain a provision (subsec. (e)) specifying criminal penalties for their violation, a separability clause (subsec. (f)), a definition of the word "person" (subsec. (g)) and a provision authorizing the Attorney General to prescribe such rules and regulations as he may deem necessary to carry out the provisions of the statute (subsec. (h)).

H. R. 408 is similar to H. R. 477 and H. R. 3552 in that it contains the same provision with respect to the conditions under which it would be required that wire and radio communications be disclosed and delivered to any authorized agent of any of the specified United States Government agencies. However, this bill would also specifically permit the officials named, upon the express approval of the Attorney General, to authorize their agents to obtain information by means of intercepting or recording telephone, telegraph, cable, radio, or similar communications, without regard to section 605 of the Communications Act and without the necessity of first securing a permit from a judge of a United States court. Admissibility of evidence obtained pursuant to the provisions of this bill would be limited to criminal proceedings in United States courts arising out of the types of investigations enumerated in the bill.

This bill also provides that the existence or contents "of such application or order" shall not be divulged except in a criminal prosecution in which information obtained by intercepting communications "pursuant to such order" is sought to be introduced. Since the previous provisions of the bill do not make reference to any applications or orders, it is impossible to ascertain precisely to what the term "of such application or order" refers, although there is a clause which would require the express approval of the Attorney General before interceptions would be permitted.

H. R. 408 would, in addition, make admissible in evidence in the United States courts in criminal prosecutions arising out of investigations of violatons enumerated in the bill information "heretofore obtained" upon the express approval of the Attorney General, by means of intercepting or recording telephone, telegraph, cable, radio, or any other similar messages or communications. Another

provision would prohibit any person, except those authorized pursuant to this bill, from intercepting, listening in on, or recording telephone, telegraph, cable, radio, or similar messages or communications, unless they are transmitted for the use of the general public or authorized by one of the parties to the message or communications, or his employment as part of the message or communications system requires such action.

The problems inherent in the unauthorized interception of private communications have long been the subject of consideration by the courts and Congress. Although the Supreme Court in *Olmstead* v. *United States* (277 U. S. 438), held that the use of evidence of private telephone conversations, intercepted by means of unauthorized wiretapping, did not constitute a violation of the fourth and fifth amendments to the Federal Constitution, vigorous dissents to this holding were registered by Justices Holmes, Brandeis, Butler, and Stone. Moreover, the policy underlying these dissents was subsequently enacted into law by the adoption of section 605 of the Communications Act, which for the first time extended the prohibitions of the Radio Act of 1927 against interception and divulgence of radio communications to prohibit unauthorized interception of wire communications, and that policy has been continued in effect until the present section 605 provides:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communications to its destination, or to proper accounting or distributing officers of the various communication centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

In *Nardone* v. *United States* (302 U. S. 379), the Supreme Court held that Government employees, including law-enforcement officials, were included among the persons who were forbidden by section 605 to engage in the practice of wiretapping. On numerous occasions since enactment of section 605 and announcement of the decision in the Nardone case in 1937, legislation has been proposed under which limited wiretapping and interception of radio communication by law-enforcement officers would have been authorized. None of these proposals were enacted.

One interpretation of the second clause of section 605 which has been offered is that, under it, mere interception of wire communications is not prohibited so long as there is no subsequent public divulgence of the contents or meaning of the interception. This interpretation appears to be based on the use of the language "intercept * * * and divulge" in the present section 605. On the other hand, another interpretation of the existing language is that intentional interception of private messages is, without consideration of the formal or public divulgence thereof, a violation of the provisions of that section. This interpretation flows from the general purpose of the section which is to protect the privacy of private communications. But, in addition, the fourth clause of section 605 presently makes it illegal for anyone who has received intercepted messages or has any knowledge thereof to use "information therein contained for his own benefit or for the benefit of another not entitled thereto." Nothing in the language of the section serves to limit the forbidden "uses" of intercepted messages to divulgence of the contents of the messages or of information obtained by means of the messages in formal court proceedings. There has been no definitive

court interpretation of this question. However, while there may be some question as to whether interception alone constitutes a violation of section 605, it is clear that intercepted messages or information acquired as a result of intercepting messages may not be introduced in evidence in proceedings in Federal courts.

This Commission has consistently taken the position that private communications should be afforded the maximum amount of privacy and, by enacting section 605 of the Communications Act, Congress has clearly indicated that it subscribes to the same view. The Commission has recognized, however, that the interests of national security may require that, in certain instances, Federal law-enforcement officers be given the authority to intercept private communications, and has expressed such views in comments upon proposals introduced in previous Congresses to authorize such activity. However, the Commission has consistently stated its beliefs that any relaxation of the prohibitions contained in section 605 should be limited to cases directly affecting the national security and should be circumscribed by the most careful procedural safeguards.

Of the three bills to which these comments are directed, H. R. 408 provides that the express approval of the Attorney General must be secured before representatives of the named agencies may obtain information by means of intercepting, listening in or or recording any messages or communications. H. R. 477 and H. R. 3552 provide that the express written approval of the Attorney General is necessary before any information obtained by intercepting or recording a communication may be disclosed or delivered to a representative of one of the specified agencies. And in addition, these latter two bills provide that before any message may be intercepted or acquired, a permit must be secured from a Federal judge authorizing the acquisition or interception of the communication. Such permits would be issued by the judge where he was satisfied that reasonable cause existed for believing that the communication might contain information which would assist in the conduct of the investigation. The Commission does not believe that it is in a position to comment as to whether, and the extent to which, the additional protections to the individual, as set forth in the latter two bills, are necessary or consistent with national security.

All three bills under consideration limit the authority to acquire and intercept communications to cases involving specified crimes and violations of specified statutes which involve the national security. However, each of the bills adds at the end of the specific listing of crimes against the national security the words "or in any other manner." It is believed that the addition of these words raises serious questions of definiteness which should receive the most careful consideration of Congress. As a result of the inclusion of these words, law-enforcement officers would apparently be authorized to intercept private communications not only in the course of investigations to ascertain, prevent, or frustrate any attempts to interference with the national security through the commission of the various crimes enumerated by the bills, but also to intercept private communications where they may believe the national security or defense is being interfered with in any other manner.

It is recognized that the Congress from time to time may desire to make activities prejudicial to the national security or defense, other than those presently enumerated in the three bills, criminal offenses or otherwise subject to restraint. However, it is suggested that the possibility of such future enactments does not require the inclusion of the words "by any other means" in the present proposals. Instead, if and when such other activities are made criminal by congressional enactments, Congress can, at that time, if it believes that the national interest so requires, provide that such specified activities shall also be included among those for which investigating officers may secure appropriate warrants to enable them to engage in interception of private communications in aid of the investigation, prosecution, or prevention of such activities.

As noted above, there is also a provision in H. R. 408 which would make admissible in evidence in criminal proceedings in United States courts arising out of any of the violations enumerated in the bill, any information obtained prior to the enactment of this statute, upon the express approval of the Attorney General, by means of intercepting, listening in on, or recording communications. This provision involves a determination relating primarily to questions of criminal law rather than of communications policy concerning which we do not wish to comment.

All of the bills under consideration contain provisions prohibiting any person from divulging or using the existence or contents of any information obtained pursuant to the provisions of these bills, otherwise than for the purposes

enumerated in the various bills. The Commission believes that this prohibition is a salutary one, which will help to prevent any possible abuse of the authority conferred by this type of legislation. It is especially important in view of the fact that, in the course of such interception, other information, unrelated to the security questions which led to securing of authority for the interception in the first instance, may come to the attention of the intercepting officers.

H. R. 408 contains an additional provision (sec. 6), not included in the other bills, which provides that no person except those authorized by the provisions of that bill, shall intercept, listen in on, or record telephone, telegraph, cable, radio, or similar communications, unless transmitted for the general public or authorized by one of the parties to the message, or his employment as a part of the communication system requires him to do so.

The provision providing that persons may intercept, listen in on, or record, communications, if authorized by one of the parties to the communication would apparently change existing law in a significant respect. Section 605 now provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or receiving of such intercepted communication to any person." Under this new provision, it would appear that a telegraph message or telephone conversation could be legally intercepted by persons other than the law-enforcement officers expressly authorized to do so by other sections of the bill, if the party receiving the message or listening to the telephone conversation consented even though the party actually uttering the intercepted language did not even know such interception was taking place. This could clearly result in an unwarranted invasion of the privacy of telephone conversations, and the Commission believes that Congress should give serious consideration to the consequences of enacting this provision.

The final clause of section 6 of H. R. 408 would exempt from its prohibitions persons whose employment as part of the communication system requires them to intercept, listen in on, or record communications. While section 605 does not presently contain any express exemption from its restrictions for employees of communications systems, it is our belief that an implied exemption for the necessary actions of communications system employees has always been recognized just as such an exception must be implied with respect to the activities of the Commission field personnel engaged in essential monitoring activities. Insofar as H. R. 408 would spell out this exemption in statutory form, there would appear to be no objection, but if such an exception is written into the act it might be appropriate also to exempt Commission monitoring activities.

Section 6 of H. R. 408 would prohibit all intercepting, listening in on, or recording of communications except for the exemptions enumerated. As we have noted above, the existing provision of section 605 have been interpreted by some as prohibiting any "unauthorized interception of private communications, while others believe that there must be both interception and divulgence in order to constitute a violation of the section.

In view of the divergent viewpoints as to the proper resolution of this problem, it is believed that some clarification of the present provision of section 605 which reads "intercept * * * and divulge or publish" might be helpful. A flat prohibition against interception per se would, however, raise serious questions as to the validity of practices and devices presently accepted and regarded as desirable. For example, the use of party-line telephones and shared frequencies in the special services radio band would be open to attack. It is, therefore, suggested that consideration be given to amending the statute to make it illegal to intercept any communication and divulge, publish, or use it or to intercept any communication with intent to divulge, publish, or use it. Thus worded, the section would protect those who might innocently intercept communications, since the intent to divulge, publish, or use the message intercepted would not be present. In the case of tapping wire communications, however, Congress might well wish to provide that the act of interception itself by anyone other than a Federal law enforcement officer acting pursuant to the provisions of the proposed bill, would constitute a prima facie case of a violation of the statute, since it is difficult to imagine any instance where wiretapping would be engaged in without the intent to receive information for divulgence, publication, or use. It is believed that this added protection for telephone communications is justified, due to the nature of that medium, and would recognize a very basic difference in the nature and use of wire as contrasted to radio communications. The user of any form of radio communications realizes that radio messages are easily intercepted and acts accordingly. In fact, when secrecy of radio messages is desired,

as, for example, over international radiotelephone, the messages are "scrambled" to make them unintelligible to anyone who might intercept them. In the case of wire communications, however, secrecy is normally both intended and expected.

The Commission would also like to add a comment concerning the prohibition in section 6 of H. R. 408 with respect to recording communications. The Commission has found, after an extensive public proceeding, that a real need and demand exists for legitimate Government and commercial purposes, for the use of recording devices in connection with interstate and foreign telephone service. We therefore concluded that the use of such devices should be permitted, on condition, however, that such use be accompanied by adequate notice to all parties to the telephone conversation that it is being recorded. Accordingly, in its report of March 24, 1947, *In the Matter of Use of Recording Devices in Connection with Telephone Service* (Docket No. 6787), and its subsequent orders of November 26, 1947, and May 20, 1948, the Commission spelled out the manner in which they could be installed so as to insure the privacy of telephone communications and inform all parties thereto that a transcription of the conversation was being made. A copy of the above report and orders of the Commission is enclosed for your information. While the Commission's rules presently require that all parties to a recorded telephone conversation be put on notice, by means of a periodic "beep" signal, H. R. 408 would apparently permit recording of telephone conversations by one of the parties thereto without any notice whatsoever to other parties to the conversation. We believe this would not be in the public interest.

Mr. KEATING. We have had a communication from the Western Union Telegraph Co. suggesting an amendment to H. R. 477, beginning at line 18 on page 2, just after the figure 1103, reading as follows:

and all carriers subject to this act are hereby authorized to permit such interception, receipt, disclosure, or utilization of the contents of any such communication by wire or radio.

Would you have any views on that; or, if not, would you give the matter your considered opinion and let us have the views of the Commission on the inclusion of a provision of that kind?

Commissioner HYDE. Mr. Chairman, if that will meet the convenience of the committee, I would like to examine that with care. This kind of business is technical, and if I can have an opportunity to relate that language to the language proposed in the bill and discuss it with my colleagues of the Commission, I will be in a better position to give you a statement on it.

Mr. KEATING. Will you give us a letter? We may wish to make that a part of the record.

Commissioner HYDE. Yes.

Mr. KEATING. Thank you very much.

(The information referred to appears at p. 90.)

Mr. KEATING. We will ask you for a report also on H. R. 5149, which was just introduced May 12 since you considered the other bills.

Commissioner HYDE. Yes. And we will offer our comment on it as soon as we have had an opportunity to examine the bill.

(The information referred to appears at p. 90.)

Mr. KEATING. Mr. Crumpacker?

Mr. CRUMPACKER. Do you envision any substantial disruption or interference with the normal activities of these public utilities by the enactment of any of these acts?

Commissioner HYDE. I should say that if the opportunity to intercept messages were carefully guarded, limited as I understand is the purpose of the legislation to do, so that it could be handled in a way that would not interfere with the normal operation of the carriers, I see no reason why the matter could not be arranged in such a way as to not interfere with their ability to transact their business.

I think that the extent to which access might be given to communications, the extent to which their privacy might be affected, could have an effect on the volume of traffic, on the use that is made of the facilities of the carriers. But I am sure that is a point that will be taken into very careful consideration.

Mr. CRUMPACKER. Do you mean by that that it might force potential lawbreakers to divert their business to other channels or something of that sort?

Commissioner HYDE. My point really was that privacy of communications service is one of the features that makes it useful, attractive, and why the public relies on its privacy and makes very extensive use of it.

Mr. CRUMPACKER. But as long as the disclosure is limited to matters affecting the national security, that should not restrict the business too much, should it?

Commissioner HYDE. It seems to me that it should be possible to both safeguard the national interest and at the same time prevent the opening up of private communications to irresponsible interception.

Mr. CRUMPACKER. That is all.

Mr. KEATING. That is all. Thank you very much, Mr. Hyde.

The next witness is Mr. C. R. Wilson, representing the Department of the Navy.

STATEMENT OF C. R. WILSON, APPEARING ON BEHALF OF THE DEPARTMENT OF THE NAVY

Mr. WILSON. Mr. Chairman, we have commented, you will remember, on the 4th of May, with reference to H. R. 477. I understand we are being requested to comment on H. R. 5149. We have no position at this moment, sir, on that latter bill.

Mr. KEATING. Did you wish to supplement the statement you made last time on the other bills?

Mr. WILSON. Only to the extent that we continue to support the provisions of those bills as of this time, sir.

Mr. KEATING. In other words, you support the position that application should be made to the court?

Mr. WILSON. We had commented requesting that the authority be vested in the secretaries of the military services, plus the Attorney General. That was considered to be probably the best legislation for our purposes. But I am certain that the Defense Department has an open mind on the subject and would be perfectly willing to go along, should it develop that the other is more desirable.

Mr. KEATING. What about the question raised by the Attorney General that the FBI is the only one that should have this authority? How do you feel about the intelligence agencies of the military and naval services?

Mr. WILSON. I would like to check and obtain a position, Mr. Chairman, on that. My personal feeling is that the agencies have responsibilities in that field.

Mr. KEATING. Well, Mr. Wilson, I realize the position you are in, but we want men before this committtee who can state the position of the department involved.

Mr. WILSON. That is right, Mr. Chairman, but we were not told to have a position on H. R. 5149.

Mr. KEATING. We want a witness here who is ready to meet these questions as they arise, and who is in a position of sufficient authority to advise this committee of the position of the service involved, and you may report back to the Secretary of the Navy that that is the kind of a witness we want here.

I appreciate the position you are in, and it is not said in any criticism of you. But these hearings are of no value to us unless we have someone here who is prepared to state the position of the service involved, as Mr. Rogers did for the Attorney General.

Mr. WILSON. I agree with you, Mr. Chairman, and I am sorry that we were not advised that we would appear on behalf of H. R. 5149, as we were today, sir.

Mr. KEATING. It is not a question of appearing on behalf of any specific bill. We want a witness here who can state the position of the Government department involved on whatever question may arise during the course of the interrogation.

One important question here is the one raised by the Deputy Attorney General, in which he said that he thought only the FBI should have this authority. I want to know whether the Department of the Navy goes along with that theory or not.

Mr. WILSON. No, sir. In line with our previous testimony, the Department has gone on record as requesting authority for the Secretary of the Army, Navy, and Air Force, and the Attorney General.

Mr. KEATING. Then we may assume, maybe, that that is the position of the Department of the Navy, and that they are opposed to limiting the authority to the FBI?

Mr. WILSON. Yes, sir.

Mr. KEATING. Mr. Crumpacker?

Mr. CRUMPACKER. Can you enlighten the committee any on this matter of who conducts investigations on military establishments?

Mr. WILSON. Yes, I believe I can, sir. Assuming that you had an allegation of espionage against a member of the military in uniform, and that the Espionage Act concerned that member's participation only as distinguished from civilian groups' participation with them, I think it would be the responsibility of the military service concerned to conduct the investigation.

There are certain activities occurring on Government reservations for which the FBI has statutory responsibility, crimes on a military reservation. And certainly in those cases, the FBI would have jurisdiction in such matters. If there were civilians involved, it undoubtedly would be FBI jurisdiction.

If there were civilian and military involved, it would definitely be a coordinated effort between the FBI and the service agency concerned.

Mr. CRUMPACKER. In the case of a man in uniform, they would be tried by court-martial or by the military service concerned, rather than in the civilian court; would they not?

Mr. WILSON. It is entirely possible; yes, sir. One consideration in that regard might be that if a man in uniform were implicated in an offense with a civilian, and it was decided that both should be subjected to the same form of tribunal, the man in uniform might be made available for trial in civil court with the civilian.

Mr. CRUMPACKER. I am wondering now about the question of rules of evidence in courts-martial, whether any legislation would be neces-

sary to make wiretap evidence admissible in a court-martial proceeding.

Mr. WILSON. I will be glad to present that problem, sir, and have an opinion on it. I think the Uniform Code of Military Justice under which we operate, of course, would probably be susceptible to Federal rules and such laws as might affect it. But we will be glad to take that question back and reply to the committee.

Mr. CRUMPACKER. That is all I have.

Mr. KEATING. That is all. Thank you, Mr. Wilson.

Mr. WILSON. Thank you, Mr. Chairman.

Mr. KEATING. Next is Mr. Franklin L. Welch, representing the Department of the Air Force.

STATEMENT OF FRANKLIN L. WELCH, APPEARING ON BEHALF OF THE DEPARTMENT OF THE AIR FORCE

Mr. WELCH. I am here, Mr. Chairman, in the absence of Mr. Levi, who is in the Counter-Intelligence Division of OSI, who is in charge of it.

The position of the Air Force is in accordance with what Mr. Wilson just mentioned: namely, that the Air Force, together with the Navy and the Army, would like to be included, instead of the presentation there that it only grant authority to the FBI.

I agree with Mr. Wilson that in our work in the Air Force we do have cases and will have cases where they refer solely to military personnel on active duty. In that respect it is my understanding that where there is no civilian angle developed, up until the stages where civilian people are engaged in that particular case, it would be strictly an Air Force investigation.

I believe that that would be true in the Navy or the Army. If, of course, as Mr. Wilson mentioned, there is joint activity, I am sure then that it would be a coordinated investigation. If the case involved primarily civilian personnel, then I feel that the FBI would assume primary responsibility or primary jurisdiction. But, nevertheless, in that case there would be a close coordination between the agency and the FBI.

Mr. KEATING. Mr. Crumpacker, any questions?

Mr. CRUMPACKER. No, sir.

Mr. KEATING. Thank you very much.

Mr. WELCH. Thank you.

Mr. KEATING. Maj. D. R. Greenlief, appearing on behalf of the Department of the Army.

STATEMENT OF MAJ. D. R. GREENLIEF, APPEARING ON BEHALF OF THE DEPARTMENT OF THE ARMY

Major GREENLIEF. Mr. Chairman, the Department of the Army will support the position that has been outlined by Mr. Wilson and the Department of the Air Force, in that we would like to see the military intelligence agencies have the authority to intercept communications and to require that the communications be disclosed under the proper safeguards as they are outlined in the bills.

I think that it is necessary, especially in overseas areas. I am sure that the Army has complete jurisdiction in the investigation of cases in

overseas areas, including both military and civilian; but the disposition of those cases, again—those cases would be turned over to the Department of Justice for disposition.

Mr. KEATING. Thank you, Major.

Any questions?

Mr. CRUMPACKER. No questions.

Mr. KEATING. Thank you very much.

Mr. Irving Ferman, Washington director of the American Civil Liberties Union, is listed as a witness, but I understand he has requested permission to be heard at the next hearing.

There are one or two statements submitted; is that right?

Mr. FOLEY. Yes, sir, Mr. Chairman. One was submitted during the noon recess by the National Lawyers Guild, with a covering letter, wherein they ask that it be incorporated into the record at this time.

Mr. KEATING. That will be received.

(The statement referred to follows:)

STATEMENT OF THE NATIONAL LAWYERS GUILD OPPOSING PENDING BILLS TO LEGALIZE WIRETAPPING

Several bills dealing with wiretapping have been introduced in the 83d Congress. These include H. R. 408 (Celler bill), 477 (Keating bill), and 3552 (Walter bill). All of these bills propose to legalize wiretapping and the interception of other wire and radio communications under designated conditions, and to permit the introduction of evidence so obtained. In addition, the Attorney General has announced his intention to propose legislation to permit wiretapping by Government agencies under certain circumstances.

H. R. 408 authorizes wiretapping by the FBI and specified military intelligence agencies in the conduct of investigations "involving the safety of human life or to ascertain, prevent, or frustrate any interference or any attempts or plans for interference with the national security and defense by treason, sabotage, espionage, sedition, seditious conspiracy," by violations of neutrality laws, the Foreign Agents Registration Act, or the Atomic Energy Act, "or in any other manner."

H. R. 477 and H. R. 3552 are virtually identical bills which differ from H. R. 408 in only two major respects: (1) They eliminate from the above list investigations involving the safety of human life, sedition (but not seditious conspiracy), and violations of the Atomic Energy Act. This change appears to be of little consequence since the bills retain the catchall phrase, "or in any other manner." (2) They require, as a precondition to legal wiretapping, the issuance of a permit by a judge of any United States court upon his being satisfied that "there is reasonable cause to believe that the communications may contain information which would assist in the conduct of such investigations."

The bills are deceptively simple in appearing to restrict wiretapping to limited fields. The basic standard is that the investigations relate to suspected "interference or any attempts or plans for interference with the national security and defense." This is a vague generality which confers a roving commission. The listing of specific crimes is not a significant limitation on this generally, since these are followed by the catchall phrase "or in any other manner." Furthermore, the crimes listed include such legislation affecting speech and association as seditious conspiracy, the Foreign Agents Registration Act, and the Voorhis Act. Unquestionably, the chief effect of the bills, if enacted, would be to legalize surveillance by wiretapping of members of radical, or allegedly radical, organizations, and this not because of any acts or threatened acts by them, but because of their views and associations.

Leaving these considerations aside, the bills are defective in their basic assumptions.

The first of these assumptions is that wiretapping is a necessary and important investigative method to detect or prevent serious crimes. It seems plain, however, that persons engaged in or contemplating enterprises involving criminal acts are most unlikely to engage in telephone conversations which would supply clues of their actions. What wiretapping really discovers is not criminal acts, but associations. Mr. J. Edgar Hoover, though a leading advocate of proposals

to legitimate "limited wiretapping," himself once admitted in an unguarded moment that wiretapping is an "archaic and inefficient" procedure which "has proved a definite handicap or barrier in the development of ethical, scientific, and sound investigative technique" (letter of February 9, 1940, quoted in 52 Harvard Law Review, 863, 870).

The second basic assumption of the bills is that the obnoxious characteristics of wiretapping can be eliminated by confining tapping to limited investigative areas and by requiring a judge's advance clearance. This assumption ignores the obvious fact that wiretapping is inherently a nonselective technique which inevitably intrudes on relations of privacy. The situation is well described in a Report on Certain Alleged Practices of the FBI, made by a guild committee, in its comment on the claim by the Department of Justice that it limits wiretapping to a very limited type of cases:

"Not only is the 'limitation' on wiretapping imposed by the Attorney General largely ignored in practice, as shown by the Coplon reports, but it is inherently meaningless. As a recent editorial in the Washington Post (January 11, 1950) so well said:

"'The limitation proposed by the Attorney General is, in any case, a meaningless one. Persons suspected of espionage or sabotage are presumed under the law to be innocent until proved guilty. Anyone may be suspected. Anyone's telephone, therefore, may be tapped under this proposal if the Attorney General suspects him. It may be that such indiscriminate wiretapping would help the FBI to catch spies and saboteurs. So, for that matter, would rifling the mails and reading private correspondence. So would unrestrained power to search the home of any suspected individual. So would suspension of the writ of habeas corpus which, as everybody knows, is used by criminals to make the work of the police more difficult. No doubt a judicious use of the thumbscrew and the rack or other third-degree techniques—applied, of course, only to noncitizens or to citizens who engaged in espionage or sabotage—would help the cops to get convictions.

"'But every free and civilized society has forbidden its police to use such methods. They are methods that distinguish and identify the police state.'

"It should also be kept in mind that it is not only the telephone conversations of the suspected person which are intercepted. The private conversations of all other persons with them or with members of their family or other persons using their phone are likewise intercepted and recorded. Thus every basic confidential relationship may be violated—that between husband and wife, parent and child, doctor and patient, lawyer and client, and minister and parishioner. The entire concept of the right of privacy, and of the freedom of communications is deeply undermined in this process" (X Lawyers Guild Review, 181, 192–193 (1950)).

Mr. Justice Holmes once described wiretapping as a "dirty business" (*Olmstead* v. *United States*, 277 U. S. 438, 470 (dissenting)). To this may be added the observation that it is also a dangerous business because it tears the fabric of freedom which is the strength of a democratic society. The enactment of any bill legalizing wiretapping, no matter how superficially hedged, would be deplorable as a long step toward a police state.

We urge the Congress to reject these and all similar bills.

Mr. KEATING. Are there any further communications?

Mr. FOLEY. Mr. Ferman asked that his statement be incorporated now, but in view of the fact that he will be here later, we might hold it.

Mr. KEATING. We will hold it until he appears.

This committee will adjourn the hearings on various bills before us that we have been discussing here, until a later date. There will be one more day of hearings, at which the opportunity will be afforded to any others who wish to be heard.

After a 20-minute recess, the committee will resume the hearings on the fireworks bills. It is necessary for the members to vote on an important amendment. We will return here in about 20 minutes to take some initial testimony with reference to these so-called fireworks bills.

The committee will stand in recess

(Whereupon, at 2:35 p. m., the hearing was recessed, subject to the call of the Chair.)

WIRETAPPING FOR NATIONAL SECURITY

WEDNESDAY, JULY 8, 1953

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 3 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to notice, at 10:40 a. m., in room 346, Old House Office Building, the Honorable Kenneth B. Keating, chairman of the subcommittee, presiding.

Present: Representatives Keating (presiding), Crumpacker, Willis, Donohue, and Fine.

Also present: Representative Celler and William R. Foley, committee counsel.

Mr. KEATING. Mr. Irving Ferman of the American Civil Liberties Union? Mr. Joseph L. Rauh of the Americans for Democratic Action?

Mr. GUNTHER. Mr. Chairman, I am John J. Gunther, legislative representative of the Americans for Democratic Action. Mr. Rauh is out of town on business and was unable to get back today. I therefore appear in his behalf.

Mr. KEATING. Do you have a prepared statement?

Mr. GUNTHER. Yes, sir, the committee has copies of it. Mr. Rauh was to appear here today on behalf of the ADA and is out of the city on business and unfortunately is unable to get back in time for these hearings. I therefore request that Mr. Rauh's testimony, which has been submitted to the committee in writing, be made a part of the record on this question and be printed in the hearings. I can either read the testimony into the record, Mr. Chairman, or just submit it; and if there are questions as to the content of the testimony, I would be very happy to have those questions and ask Mr. Rauh to submit his answers in writing by the end of the week. He will be back in town tomorrow.

Mr. KEATING. Would you be prepared to respond to questions in regard to this matter?

Mr. GUNTHER. I would prefer limiting my response to questions with regard to the process through which the ADA authorized taking the position, and questions about ADA, if that were necessary. But as to the legal arguments, Mr. Rauh would be more capable of doing that than I.

Mr. KEATING. The statement of Mr. Rauh will be made a part of the record of the proceeding.

(The statement of Joseph L. Rauh, Jr., on behalf of Americans for Democratic Action, is as follows:)

TESTIMONY OF JOSEPH L. RAUH, JR., ON BEHALF OF AMERICANS FOR DEMOCRATIC ACTION WITH REFERENCE TO LEGISLATION TO AUTHORIZE THE USE OF WIRETAPPING

My name is Joseph L. Rauh, Jr. I am an attorney, engaged in the practice of law in Washington, D. C.

I appear here today to present the views of Americans for Democratic Action (ADA) on the question of authorization of wiretapping and the use of evidence obtained thereby. I am a national vice chairman of ADA. The views I present in this statement were approved by the ADA executive committee on June 22, 1953.

Wiretapping today is illegal in all respects. Not only is the evidence inadmissible in court but the act of tapping is itself a violation of law.

Wiretapping is an invasion of the right of privacy and a serious infringement of civil liberties. That is why the Federal Communications Act prohibits all forms of wiretapping and why the Supreme Court gave this prohibition such wide scope in the second Nardone case. Before we legalize any wiretapping or permit its use in court, we must be certain that the defense of our country against espionage and sabotage requires this infringement upon privacy and that the grant of authority to tap is no broader than the necessities of the situation.

Weighing the dangers from espionage and sabotage against the dangers inherent in limited wiretapping, ADA favors legislation for a definite period of time to authorize wiretapping by the Department of Justice and the use of evidence so obtained in court, if:

1. The case involves espionage or sabotage;

2. A Supreme Court Justice or the chief judge of a circuit court of appeals approves the tap in writing after assuring himself, upon a written representation of the Attorney General, that there is substantial reason to believe that espionage or sabotage has been or will be attempted; and

3. Taps under all other circumstances are expressly prohibited and criminal penalties for violation of this prohibition are made explicit.

On May 8, 1953, the Attorney General urged the enactment of the following:

"That, notwithstanding the provisions of section 605 of the Communications Act of 1934 (48 Stat. 1103), information heretofore or hereafter obtained by the Federal Bureau of Investigation through the interception of any communication by wire or radio upon the express approval of the Attorney General of the United States and in the course of any investigation to detect or prevent any interference with or endangering of, or any plans or attempts to interfere with or endanger, the national security or defense, shall be admissible in evidence in criminal proceedings in any court established by act of Congress."

In his letter transmitting this proposal to Congress, the Attorney General urged that:

"The attached proposal, which I commend to your consideration, is limited in several respects. In the first place, its application would be restricted to investigations relating to the national security or defense. Secondly, wiretap evidence would be admissible only when obtained by the Federal Bureau of Investigation. Thirdly, wiretapping within the contemplation of the bill would require the express approval of the Attorney General. Finally, wiretap evidence would be admissible only in criminal proceedings in Federal courts."

We find three principal objections to the Attorney General's proposal:

First, it would probably be deemed to amend the Communications Act of 1934 to give legislative approval to all wiretapping by Federal agents. By expressly permitting use of wiretap evidence in court in the case of certain crimes, the proposed bill would have the effect of legalizing the wiretap itself in all instances.

Second, the proposal would permit the use of evidence obtained by wiretapping in crimes "endangering the national security or defense." The specific crimes should be listed and thus limited to espionage or sabotage. The term "national security or defense" is vague and uncertain in meaning.

Third, the proposal is lacking in judicial safeguard, for the Attorney General is charged with policing his own action. Wiretapping is a serious business, and for the executive to engage in it prior specific approval from the judiciary should be required. Wiretapping, like searching, is a governmental inquiry into the privacy of an individual's affairs, and, as in searching, wiretapping needs supervision by the highest courts.

Mr. KEATING. Mr. Rauh's statement does not contain the method by which ADA arrived at these conclusions?

Mr. GUNTHER. It says the executive committee authorized him to appear here and take this position, which is the case.

Mr. KEATING. Did you want to elaborate on the method by which that resulted?

STATEMENT OF JOHN J. GUNTHER, LEGISLATIVE REPRESENTATIVE, AMERICANS FOR DEMOCRATIC ACTION

Mr. GUNTHER. The question was raised at the ADA national convention; and a resolution on wiretapping was approved by the convention's domestic policy commission and was referred by the convention to the national board, which in turn referred it to the executive committee. The executive committee, meeting on June 22, 1953, voted to support this position.

Mr. KEATING. You are familiar with the contents of the statement?

Mr. GUNTHER. Yes; I am.

Mr. KEATING. I am very interested in the viewpoint presented by the ADA. I would like to ask you a question or two about No. 2, the second condition, wherein you advocate that a Supreme Court Justice or the chief judge of one of the circuit courts of appeals approve of the wiretapping. The bill, H. R. 477, does provide for court permission. There are some who have appeared here who advocate that the permission be granted without court permission. But H. R. 477 does provide for that, although not on as high a level as that to which you refer. I am a little worried about the practical side of that as to whether it would be practical to have to go to one of those judges, who might not be too available; and also that it might entail a degree of work on their part which would scarcely be justified.

Mr. GUNTHER. I believe the feeling of the executive committee is that there will not be a large number of cases where wiretapping should be authorized, and that the great majority of cases would probably be instances where the Attorney General would be here in the District of Columbia, where the Supreme Court does sit and where there is a circuit; and therefore it would be better to have a limited number of judges handling this question, thereby keeping a more centralized control over it so that if the courts wanted to look into it or the Congress wanted to see how this was working out there would be a limited number of offices it had to go to and a limited number of people it had to ask about this question, rather than every district judge in the United States.

Mr. KEATING. There is something to your argument. Of course it is desirable to have these applications concentrated, I would think, as much as possible with certain judges for the additional reason it would result in less chance of leakage of information. That is one of the chief problems which has bothered me in connection with the Attorney General's presentation, in which he advocated that the bill not provide for going to court. I think Congressman Celler in his presentation also took the same position. It of course would destroy much of the effectiveness of the bill if it were going to become public property.

Mr. GUNTHER. The law would be useless.

Mr. KEATING. That is right. But I am just a little concerned about whether we should load up the Supreme Court or the chief judge of the court of appeals with that type of work; and also, where applications were being made in other parts of the country, I am not sure that would be feasible. But we will take that suggestion under consideration.

Mr. GUNTHER. Thank you, Mr. Chairman.

Mr. KEATING. There is one other thing I noticed in your statement. You advocate that this apply only for a fixed period of time. In other words, you are inclined to be opposed to permanent legislation?

Mr. GUNTHER. We would be inclined to have it for a fixed period of time so that we would be assured of legislative review at some time. Three or five years from now the Congress would have to take up the question: Has this worked out? Should it be continued? So the question would be aired again before the Congress. That was our thinking there. So long as the problem exists and in the wisdom of the Congress they feel it exists, then the law could be extended; but we would advocate a fixed period so that it would be mandatorily reviewed here before you sometime in the future, rather than going into the statutes for an indefinite period of time.

Mr. KEATING. I want to say I did not know what position ADA was taking, but I am not sure the committee would go along with all its suggestions. However, I do think you should be commended for recognizing the problem in saying that you are weighing the dangers from espionage and sabotage against the dangers inherent in limited wiretapping.

There are dangers on both sides. I think the committee recognizes that. We must be very careful to weigh those; but in weighing them, you have reached the conclusion that you favor legislation for a definite period of time to authorize wiretapping. The bill, H. R. 477, of course, attempts to set up not only quite strict safeguards in connection with wiretapping, but also to provide on the other side that illegal wiretapping shall be seriously dealt with. There is nothing now which provides for that, as I understand it.

Mr. GUNTHER. Those are two of the principal points of the ADA position which we wanted to stress—that in legislating to authorize the use of wiretaps and wiretap evidence, the committee try to get as tight language as possible to make certain that the legislation by implication does not legalize wiretapping which is now going on, or wiretapping other than that authorized by the justice or judge in specific instances. We also recommend the tightening up of the language recommended by the Attorney General so that the law speaks of the crimes espionage and sabotage. I think we should tie it right down to the definable crimes in the code, rather than talk about national defense and national security.

We have seen in some instances where statutes had been enacted by Congress which spoke of sensitive agencies, national security, and national defense, which have been by Executive order extended to every agency in the Government—to every one. That has happened, and we think we should not permit that to happen in the case of wiretapping.

Mr. KEATING. You would certainly extend it also to the crime of treason?

Mr. GUNTHER. Yes, I think that would be included in the espionage or sabotage.

Mr. KEATING. Seditious conspiracy is spoken of in H. R. 477.

Mr. GUNTHER. I think that the code now spells out in detail the acts and intent involved in the crimes of espionage and sabotage.

Mr. KEATING. Mr. Crumpacker, did you have any questions?

Mr. CRUMPACKER. Yes. At the bottom of page 2 and the top of page 3 of your statement here I find this sentence:

> By expressly permitting use of wiretap evidence in court in the case of certain crimes, the proposed bill would have the effect of legalizing the wiretap itself in all instances.

Mr. GUNTHER. Yes, sir.

Mr. CRUMPACKER. I have difficulty in following that statement, inasmuch as the bill expressly limits the occasions when the wiretapping may be done to the express crimes and under express authorization by a Federal district judge. I do not see how you arrive at this conclusion that the bill would have the effect of legalizing the wiretap itself in all instances.

Mr. GUNTHER. Congressman, we are somewhat concerned about the language in the Attorney General's proposal where he says, "Information heretofore or hereafter obtained amends section 606 of the Communications Act." Therefore it would seem to us, if it applied to evidence heretofore obtained, it would be a retroactive approval of the wiretap which he made illegally. We do not want to go into the question of whether this evidence should be usable, but if it would seem to imply that if you accept our premise that wiretapping under the second Nardone case is illegal, if the Attorney General is now permitting tapping wires, we would contend that is illegal and this would legalize what he has done in the past.

We are afraid that it might be construed that way; therefore our statement reads, "Probably be deemed to amend the Communications Act to give legislative approval to all wiretapping." If that is not the case and if you would make that clear in your bill and in the report, then that would meet our fears.

Mr. CRUMPACKER. Then in this sentence where you refer to a proposed bill, you are not referring to any of these bills that have been introduced, but what you assume the Attorney General is proposing to have introduced?

Mr. GUNTHER. We quote here the proposal of the Attorney General and that is what we are referring to. Maybe the Attorney General's language does not do that. As we say, "First, it would probably be deemed to amend the Communications Act of 1934, and so forth," and we put the probability in there because we are not certain exactly what the courts might do with the language We want you people and the committee to think and try to get language to make certain that this legislation does not legalize all wiretapping. That is why we ask No. 3 as one of our requests, that taps under all circumstances be expressly prohibited and criminal penalties for violation of this prohibition made explicit.

Mr. CRUMPACKER. Of course the Attorney General in his language specifically limits it to "investigations to detect or prevent any interference with or endanger any plans or attempts to interfere with or endanger the national security or defense." In other words, the At-

torney General does not propose to legalize wiretaping in all instances.

Mr. GUNTHER. If that is the purpose of the Attorney General, and the taps were to have prior approval by the judges, then we would be in agreement with him. The Attorney General proposed language for a bill, and in his letter talked about the use of the evidence rather than the use of the wiretaps. We would rather put the emphasis on the use of the evidence, yes, when crimes of espionage and sabotage are involved; but no legal wiretapping under other circumstances.

Mr. KEATING. Thank you, Mr. Gunther. Mr. Irving Ferman of the American Civil Liberties Union. We will be glad to hear you, Mr. Ferman.

STATEMENT OF IRVING FERMAN, AMERICAN CIVIL LIBERTIES UNION

Mr. FERMAN. My name is Irving Ferman. I speak on behalf of the American Civil Liberties Union as director of its Washington, D. C., office. The union is a private, nonpartisan organization interested in promotion of the Bill of Rights. Accordingly, it has interested itself over 30 years in the protection of civil liberties of our citizens.

It is vitally concerned with the subject matter of wiretapping as a civil-liberty matter of the utmost importance. The union basically is in agreement with the dissenters in *Homestead* v. *United States* and their feeling that wiretapping should be barred by the purview of the fourth and fifth amendments of the Constitution, which afford the citizen protection against an infringement of his privacy by Government compulsion. However, we are keenly aware of the necessity for an evaluation of this whole problem in view of the present threat to our internal security by subversive groups. If indeed legislation is enacted to permit wiretapping, it is all the more essential that appropriate safeguards be enacted as well.

We therefore suggest that, should Congress disagree with our contention that all wiretapping should continue to be outlawed and actually legislate wiretapping, all of the following safeguards be adopted.

(1) All wiretapping should be prohibited except by Federal officials in cases involving treason, sabotage, espionage, and kidnaping, or threats of kidnaping. In the latter type of cases parents' wires should be tapped only with their prior consent.

(2) The authority to grant permission for wiretapping should be vested in one Federal judge assigned by Justices of the Supreme Court for 10-year periods for each district.

(3) Only the Attorney General should be allowed to apply directly to the court for permit to tap a wire. Requests for permission would be channeled through him.

(4) A court would not authorize a wiretap except upon sworn statement of fact demonstrating reasonable basis for belief of actual, as opposed to potential, treason, sabotage, espionage, or kidnaping.

(5) An application would include the name of the suspect and the subscriber and the number of people who use the line.

(6) Complete records of all applications and approvals would be kept.

(7) Only recordings, sealed and preserved in a central place, could be used in evidence. If they were so employed, all recordings made in connection with an investigation would have to be made available to

the defendant at Government expense. Irrelevant material that might injure innocent outsiders could be excised upon agreement between Government and defendant. Recordings could be destroyed only on court order.

(8) Taps would be authorized for a maximum of 90 days, with a 90-day renewal permitted by a judge if he found such action desirable.

(9) The press and public would be informed by monthly and annual reports of the number of taps sought for each type of case; the number granted; and the number resulting in prosecution or conviction and other pertinent data.

(10) Strict penalties would be provided for any persons who tapped a wire illegally, and each year a Federal grand jury would be convened to determine whether the law had been violated.

11. The present provisions of the law should remain in effect so as to prohibit any unauthorized tapping or disclosure of information obtained by tapping, whether authorized or unauthorized.

We believe in the suggested safeguards against wiretapping in a statement made by J. Edgar Hoover in 1941, in which he said:

> I have always been and am now opposed to uncontrolled and unrestrained wiretapping by law-enforcement officers. Moreover, I have always been and am now opposed to the use of wiretapping as an investigative function except in connection with investigations of crimes of the most serious character, such, for example, as offenses endangering the safety of the Nation or the lives of human beings. I also feel that world developments of the past year or more and the changed conditions resulting therefrom have increased the gravity from the standpoint of national safety of such offenses as espionage and sabotage.
>
> In other words, my view is that wiretapping should not be permitted except as to such crimes as I have described, and even then in such limited group of cases only under strict supervision of higher authority exercised separately in respect to each specific instance. In the group of cases I have in mind such as espionage, sabotage, kidnaping, and extortion, wiretapping as an investigative function is of considerable importance.

Applying these recommended safeguards, we would like to comment on existing legislation being considered by this committee. The first is H. R. 477—and which, I might say, the union, of all the legislation which has been proposed in this field, feels the most kindly to—with this one caveat——

Mr. KEATING. Thank you for those kind remarks.

Mr. FERMAN. We feel that the language in this bill dealing with the authorization of wiretapping is somewhat vague. I would like to quote from the language dealing with the specific crimes which could be used as a basis for the granting of court order:

> In the conduct of investigations to ascertain, prevent, or frustrate any interference or any attempts at plans for interference with national security and defense by treason, sabotage, espionage, seditious conspiracy, violation of neutrality laws and violation of the act requiring the registration of agents of foreign principals, violations of the act requiring the registration of organizations carrying on certain activities within the United States, is much too vague and broad, and thus is liable to make the practice abusive of our fundamental rights.

We believe, I repeat, that permissive wiretapping should be confined to sworn statements of fact demonstrating reasonable basis for belief of actual, as opposed to potential, treason, sabotage, or kidnaping.

Mr. KEATING. I assume it would be inherent in the idea of getting a court order that the court would have to be convinced by sworn statements about the reasonable basis for belief that such a crime had been committed. Do you think that applies to too many offenses?

Mr. FERMAN. Yes. I would not say that it applies to too many offenses as much as I would say it applies to too many situations with respect to the offenses. That is, situations in which there might be reason for belief that a potential crime might be committed as opposed to an actual crime with reference to these particular offenses.

Mr. KEATING. Of course you are in a position, when you are investigating, where you may not know for sure whether a crime has been committed or not.

Mr. FERMAN. That is true, Mr. Chairman.

Mr. KEATING. You may not have the goods on someone who is suspected as a security risk. You may be seeking to get the information upon which to pin a prosecution. I think before a court granted the right to intercept communications, the court must have a sworn demonstration to it of a reasonable basis for belief that there has actually been treason or sabotage committed.

Mr. FERMAN. No; that there is contemplated an actual commission of crime. It is a question of degree, of course. But the situation in which we would be opposed to the granting of a court order is mere suspicion that a group of people are of such disposition politically that they might be suspected of committing a crime involving espionage. We would be opposed to granting an order in such a case. However, we would approve within the framework of our thinking the granting of a court order in which there is reasonable basis for believing that these suspects are actually contemplating a crime. It is a question of degree.

Mr. KEATING. You do extend it to kidnaping. That is not included in H. R. 477, and that is one of our problems, whether to extend it beyond crimes involving national security. Do you feel it should be extended?

Mr. FERMAN. Yes; that is the position that the union has taken.

Mr. KEATING. I certainly think that is a despicable crime and one of the most horrible that can be committed. The question is, however, if you extend it to kidnaping, should you extend it to murder or other offenses?

Mr. FERMAN. I hate to be put in a position to be less of a civil libertarian than the chairman.

Mr. KEATING. That is our problem. I think the committee is conscious of the fact that this is a sensitive area in which to proceed, and there seems to be a quite general feeling among all groups that something should be done in the field of national security. It is just a question of whether, while we are at it, we should go further and cover other crimes. Yesterday I was approached on the question of including narcotics violations. Of course, again, particularly the selling of narcotics to minors, arouses as much anger and resentment in a decent citizen's mind as any other. But if we extend this to all crimes, we are going to be in hot water as a practical matter in getting any legislation.

Mr. FERMAN. The reason for our including kidnaping, I suppose, is this, that other crimes—other than crimes dealing with our national security—lend themselves more to the normal investigative process which precludes the use of wiretapping. But the commission of a crime involving kidnaping, the swiftness with which action has to be taken, does not permit the orderly process of the investigative function

as much as other crimes do. Therefore we feel that wiretapping should be permissive.

Mr. KEATING. Proceed.

Mr. FERMAN. I would like to comment on H. R. 5419. We are opposed to the proposal that the Attorney General be judge of whether wiretapping should be permitted in a given situation. In support of this position we would very much like to quote from Representative Francis Walter, who said in 1941:

> Now it seems to me that if legislation of this sort must be enacted, that we have a very well-established method of inquiring into the privacy of an individual's affairs, namely, through a search warrant; and it seems to me that this bill—

which at that time was H. R. 2266—

> can be amended so as to compel whatever investigative officer feels that acts of sabotage are being committed or about to be committed to appear before an agent other than the one to whom he is answerable. If you please, it certainly seems to me that this is another step toward the abandonment of our fundamental theory of a separation of the powers in our Government. If an agent is required to appear before a United States judge or a United States commissioner, there will be two advantages. First and foremost is the preservation of our fundamental theory of separation of powers; and, secondly, it is not probable that every case of sabotage or suspected sabotage is going to be committed in the District of Columbia.
>
> If the act complained of is being committed in any one of the States, it is going to be difficult for the investigator to come back to Washington and secure this permit and then go back and tap the wire. However, if the authority is given to the Federal courts, then the agent will have to appear before the authority, the commissioner or the judge, and then in my judgment he ought to be compelled to do this. He ought to be compelled to make out a case of probable cause, because certainly the tapping of a telephone wire is just as much an invasion of the privacy of a citizen as is a search of a home of a citizen, and it would seem to me that if the agent is required to make out a case of probable cause and then secure a permit, which would be in the nature of a search warrant, then there could be an inquiry made at the time of the trial if evidence were secured in that manner as to the sufficiency of the evidence introduced at the time the permit and the nature of the search warrant were secured.

We would like to urge your committee to make a complete and full investigation into all facts relating to wiretapping, which you are doing. However, this investigation, we submit, should encompass a study of the mechanical methods of wiretapping, its operation in relation to decided cases, and in terms of the already existing uses of wiretapping by the various governmental agencies. We respectfully submit to this committee that an investigation should include more than testing of personal opinions and the pros and cons on the true wisdom of wiretapping. I hope I am not being too presumptious in making that suggestion.

Mr. KEATING. We are glad to have your views, Mr. Ferman, in that regard. A congressional committee is always confronted with a problem of where they are going to stop from continuing investigations on most any subject at great length. We do have a time limit involved. Mr. Crumpacker?

Mr. CRUMPACKER. No questions.

Mr. KEATING. Mr. Fine?

Mr. FINE. I just want to make sure of one thing. Your position is you are against wiretapping. But you are willing, so far as obtaining a permit, to include espionage, forgetting kidnaping for the moment. Is that correct?

Mr. FERMAN. Yes.

Mr. FINE. But then, you see, that is where I do not understand your position. In the case of espionage, it is a question of degree as to just when wiretapping should be permitted. In the cases where it was a reasonable certainty that a crime is to be committed and not mere suspicion. Is that your position?

Mr. FERMAN. Yes.

Mr. FINE. Are you really making it difficult, then, for the Attorney General? Is it not almost impossible to get a wiretapping order?

Mr. FERMAN. I do not think so, because I think one has to assume, and one could assume, that other investigative methods are open to the police officers.

Mr. FINE. They would to be all divulged.

Mr. FERMAN. No, not necessarily.

Mr. FINE. They would have to be divulged in order to get the order from the court.

Mr. FERMAN. The contents of the order will never have to be divulged.

Mr. FINE. The Attorney General would have to tell the court in a sworn statement that these are the facts; we have discovered these facts through other sources.

Mr. FERMAN. That, as I understand it——

Mr. FINE. Unless the Attorney General had those facts, he could not get the order.

Mr. FERMAN. The order is made ex parte in private chambers and kept under lock and key.

Mr. FINE. That is one of the problems.

Mr. FERMAN. I think the experience in New York State, where we do have such a procedure, has worked to the extent the committee could take notice of the procedure. I do not know what the figures are, but last year extraordinarily large numbers of orders were granted in New York State and privacy was maintained, and secrecy.

Mr. FINE. As I see it now, if you are going to extend it to espionage cases, I do not think you ought to tie the hands of the Attorney General to the point where he has to prove his case up to a certain point in order to get the order.

Mr. FERMAN. We feel the interest in maintaining privacy of American citizens——

Mr. FINE. That is different, now. You are either against it or you are for it. If you are against it, you are against it for all purposes. If you are for it in a limited purpose, you have to leave the door open sufficiently for the Attorney General to walk in.

Mr. FERMAN. I think that a court order based upon a reasonable belief that an actual crime is going to be committed will leave sufficient latitude with the police officers or investigative officers to be able to cope with the situation, keeping in mind that wiretapping is not the only investigative device available; that a good police officer could get the facts very, very often without wiretapping, which is the problem that we always have in our feelings with respect to wiretapping, not to make our investigative officers lax because of the ease with which wiretapping could be committed.

Mr. KEATING. Thank you, Mr. Ferman. We have with us our former colleague, Mr. Biemiller of Wisconsin. Mr. Biemiller is representing the American Federation of Labor. We will be glad to hear you.

STATEMENT OF ANDREW J. BIEMILLER, MEMBER, NATIONAL LEGISLATIVE COMMITTEE, AMERICAN FEDERATION OF LABOR

Mr. BIEMILLER. Thank you, Mr. Chairman. Mr. Chairman and members of the committee: My name is Andrew J. Biemiller. I am a member of the national legislative committee of the American Federation of Labor. We appreciate the opportunity to present our views on the wiretapping bills now pending before this committee.

I request permission to include in the record with my testimony a brief prepared by our attorneys analyzing the various bills before the committee. This brief makes certain suggestions which we trust will be helpful to the committee in its deliberations.

Mr. KEATING. Do you have that with you?

Mr. BIEMILLER. Yes, I have it with me.

Mr. KEATING. It will be made a part of the record. It is not too long, is it?

Mr. BIEMILLER. About four pages.

Mr. KEATING. We will be happy to make that a part of the record.

Mr. BIEMILLER. This statement makes certain suggestions which we trust will be helpful to the committee.

(The statement is as follows:)

ANALYSIS OF HOUSE BILLS ON WIRETAPPING

(H. R. 477, 3552, 408 AND 5149)

1. H. R. 477, introduced by Representative Keating on January 3, 1953, permits wiretapping and use of information thus obtained in certain criminal and civil proceedings. Specifically, it authorizes the FBI and the Chiefs of Intelligence of the Army, Navy, and Air Force, under rules and regulations to be prescribed by the Attorney General, to wiretap or intercept or acquire telegrams, radiograms or other communications without regard to the limitations contained in section 605 of the Communications Act of 1934. Wiretapping or the acquiring of such information is permitted only in attempts to prevent interference with the national security and defense by treason, sabotage, espionage, seditious conspiracy, violations of neutrality laws, or violations of foreign agent or organization registration laws, "or in any other manner." Any information thus obtained is admissible in criminal or civil proceedings involving violations of any of the foregoing laws in which the United States Government is a party. It is necessary, however, for such agencies to obtain a permit from a Federal district court judge to acquire or intercept such information upon a showing that there is reasonable cause to believe that the communications to be intercepted may contain information which would assist in the conduct of investigations of violations of such laws. It is specifically provided that no person shall divulge, publish or use any information thus intercepted for purposes other than assisting in investigation of alleged violations of such laws or in connection with trials for violations of such laws. It is further required that no person shall fail to disclose or surrender any such information in his possession or under his control except to an authorized Government agent. Violation of these requirements is punishable as a felony.

II. H. R. 3552, introduced by Representative Walter on February 26, 1953, is, for all practical purposes, identical with H. R. 477.

III. H. R. 408, introduced by Representative Celler on January 3, 1953, is similar in substance to the foregoing two bills, with the following important exceptions:

1. The information can be intercepted in investigations involving the "safety of human life," as well as in investigations involving the national security or defense, and there is also included investigations of violations of the Atomic Energy Act of 1946.

2. Any information so obtained is admissible only in criminal proceedings and not also in civil proceedings as under the above two bills.

3. There is no necessity for the FBI or the Chiefs of Military Intelligence to obtain a court order prior to the intercepting of any such information; all that is required is the approval of the Attorney General.

4. This bill contains an additional section which specifically prohibits any person other than those authorized under the act from intercepting any such information.

IV. H. R. 5149, introduced by Representative Reed on May 12, 1953, provides simply that information obtained by the FBI, upon express approval of the Attorney General, in the course of any investigation involving the national security or defense, shall be admissible in evidence in criminal proceedings in Federal courts.

CONCLUSION

While important protections against self-incrimination and important rights of privacy may be abridged by the bills in question, nevertheless it would seem that considerations of national security should override objections on these scores as long as wiretapping and interception of communications are strictly limited to national security and defense and other adequate safeguards concerning the acquiring or use of information by such methods are provided for. H. R. 477, and 3552 would appear generally to so limit the power of wiretapping and interception. However, there are several infirmities in the bill which require correction before it could be considered acceptable. In the first place, while the bill seemingly limits permissive wiretapping and interception of communications to investigations of interference with the national security or defense by reason of treason, sabotage, and other specifically named crimes, there is added a catch-all phrase "or in any other manner." Presumably, a strike or labor dispute in a defense industry or in an industry affecting national defense might be included within this catchall, as well as many other activities, so that there would really be no limit to fields in which wiretapping might be permitted, provided only that they be somehow related to national defense. It would be far preferable to omit the phrase "or in any other manner" as a means of safeguarding the legitimate activities of labor organizations.

Another weakness in the bill as presently phrased is that it requires any person who has obtained any information, by wiretapping or otherwise, concerning any possible national defense violation to turn over such information to authorized Government agents on request. This would seem to encourage private snooping and wiretapping by private individuals. The bill should be amended to make it clear that the only persons who can lawfully wiretap are duly authorized Government agents.

Finally, in this respect the bill should contain a provision similar to section 6 of H. R. 408 which would specifically prohibit, under criminal penalty, any person other than those authorized under the act from intercepting any information by wiretapping or otherwise.

H. R. 408 is objectionable in two respects. First, it permits interception of communications in investigations involving the "safety of human life," as well as in investigations involving the national security and defense. The term "safety of human life" is a very broad and general one and does not sufficiently restrict the area in which wiretapping can be indulged in. Second, the bill does not require a court order to institute the wiretapping or other methods of communication interception authorized under the act.

H. R. 5149 is objectionable because it does not contain the safeguards that are present in the other bills.

Mr. BIEMILLER. The labor movement has long resisted any abridgment of the constitutional guaranties against self-incrimination. However, we recognize compelling reasons of national security, in the present world conflict with communism, which makes it desirable to permit wiretapping by authorized Government agents in cases involving espionage and permit the utilization of such evidence in court actions. Such wiretapping should be properly safeguarded by requiring a court order in each instance.

However, we further believe that, if the committee is going to take up wiretapping legislation at this time, thorough and proper consideration should be given to incorporating provisions in any bill that is reported which will provide stiff penalties for wiretapping by private individuals. It is desirable that this obnoxious practice which has become very widespread in recent years be eliminated. We condemn

private wiretapping as violative of our most cherished American rights and traditions and believe every possible effort should be made to suppress it completely. We are confident this committee will concur in our views.

As I stated, Mr. Chairman, there is this statement by our attorneys that I think is at your disposal. I do not believe there is any point in belaboring the point at this stage of the procedings.

Mr. KEATING. That has been made a part of the record. Your conclusion seems to be, appearing on page 3, you object to H. R. 408 and 5149; and while you have suggestions for certain modifications, H. R. 477 and 3552 come closest to meeting your position.

Mr. BIEMILLER. That is correct.

Mr. KEATING. Mr. Willis, do you have any questions?

Mr. WILLIS. No.

Mr. KEATING. Mr. Crumpacker?

Mr. CRUMPACKER. No.

Mr. KEATING. Thank you very much. We will take these suggestions under consideration and we will carefully go over the legal suggestions made by your attorneys. We will now here from Mr. David Whatley.

STATEMENT OF DAVID WHATLEY, BETHESDA, MD.

Mr. WHATLEY. Thank you, Mr. Chairman. I am grateful for the opportunity of securing a few minutes of the committee's attention, particularly since I represent no organization and am a rather obscure attorney. But this is a subject that is extremely interesting to me. I have been interested in giving more attention to investigative activities in the country and protection against so-called sabotage. Bacteriological warfare has been my major concern for a number of years.

I should therefore like to appeal to the committee to seek language which would strengthen the hands of the Attorney General in this whole field. I should hope that it will not be confined to espionage and sabotage matters, but would cover all Federal laws, law enforcement of whatever nature. I think the protection of the life of the President, inciting to rioting, selling narcotics to minors, and many other Federal crimes are as serious as kidnapping. I suggest to you that the proper investigation of the possible violation of many of these crimes might very well lead to evidence which would uncover subversive plots. I think that there has been too little attention paid to the connection between possible subversive plots and the general criminal element within the country. In the case of any substantial danger to the country, I believe that criminals would be employed on a large scale.

I think all of the bills are deficient, particularly by oversight, of the possibility that evidence hereafter secured by State and local law-enforcement officials is not permitted to be used in evidence. I suggest that many instances might be uncovered by State and local law-enforcement agencies investigating their own State crimes which unexpectedly might lead to evidence of the commission of Federal crimes or of the more serious matters of espionage and sabotage; that the bill should be amended to permit the use of that evidence without the necessity of thereafter going to the Attorney General or to the

courts and securing permission for an additional wiretap, since it would be very improbable, I would think, that the evidence could be secured at a latter time.

The criminal might very well have ascertained that his wire would thereafter be tapped once he had been under investigation by the State and local law-enforcement officials.

I think there should be a central control by the Department of Justice over the military investigative agencies, but I do not believe that there should be required individual permission for each individual wiretap. I think it has been adequately testified already that the requirements in one of the bills for the securing of permission from an individual Federal judge might lead to a disclosure of the fact that the wire is being tapped. I believe that our present Attorney General, or even the distinguished Director of the FBI, could be entrusted to make adequate regulations and exercise adequate supervision over the whole system without requiring individual applications for individual wiretapping. I believe the Congress through its Internal Security and Un-American Activities Committees, if not also this subcommittee, could make a continuing study of the observance and administration of the bills so that there would be no abuses. I think that it is not the intention of any Federal investigative agency to go in for indiscriminate, all-out wiretapping of everyone's telephone.

I, however, feel that there should be more importance attached to the entry of this evidence into a court proceeding rather than into the prohibition of wiretapping itself. I would propose, in other words, that the Attorney General or the Director of the FBI and the other Federal investigative agencies be given almost carte blanche, with adequate supervision by the congressional committees, as to investigation of any kind of crime by wiretapping or other listening devices. I think that those words should be included in the bills. But that the recordings should be very closely controlled, be kept in a central location under lock and key and be divulged in only that part which would be pertinent and germane to the criminal prosecution at the time that it is sought to be introduced into evidence before the court.

I think the same safeguards should apply to grand-jury proceedings. That has not been mentioned, but I think that the suspects should have an opportunity to refute any implications or evidence that may have been gathered, even in the grand-jury proceedings as well as in Federal criminal court.

Mr. WILLIS. At what point would the refutation come? I do not know that I follow you there.

Mr. WHATLEY. I would propose that he have notice that the recordings were to be offered to the grand jury or to the court, and that he have an opportunity to hear the recordings or his attorney have an opportunity to refute it before it is offered as evidence.

Mr. WILLIS. That is very interesting. You are engaged in the practice of law, I take it?

Mr. WHATLEY. Yes, sir.

Mr. WILLIS. Here in Washington?

Mr. WHATLEY. Yes, sir.

Mr. WILLIS. This bill would make admissible in evidence the recordings of the wiretapping, and, of course, there must be some point in

the chain of events or during the trial that would present very, very difficult situations. I imagine you would have to retire the jury in most cases.

Mr. WHATLEY. I would hope so.

Mr. WILLIS. Suppose that recording contains a confession, contains incriminating evidence. Could this bill override the Constitution in that regard?

Mr. WHATLEY. I think it would not under a strict interpretation of the constitutional language.

Mr. WILLIS. Would not the mechanics of it be that somehow the jury would be retired and the record played in order to give the defense counsel an opportunity to object? Because it is just like forcing him to take the stand if there were certain incriminating statements by him that would otherwise be inadmissible in evidence. How would that work?

Mr. WHATLEY. I would hope that the bill would set out the procedure so that any prosecutor who sought to introduce these recordings in evidence, either before any grand jury or in open court, it should be done in the presence of the counsel of the defendant and in closed session, without the jury present or any of the public present. A record could be kept for the court in case of appeal; but that record, I think, should not be made public.

Mr. WILLIS. That would not be the usual thing. You have that situation in many criminal trials where a confession is sought to be introduced in evidence. The jury is retired and the public is right there.

Mr. WHATLEY. I think the public should not be there.

Mr. WILLIS. They usually say, "I did not beat him; I did not coerce him, or I did not promise him." Usually the judge hears the whole story outside the presence of the jury and he rules whether to let that go to the jury or not, or it is barred because it is not a voluntary confession.

Mr. WHATLEY. I understand that is the usual practice, for the jury to be retired but not the public. I think in the case of wiretapping containing confidential matters of competence that may or may not be admissible in evidence, the jury and the public should be barred before the matter is introduced as evidence. Then in the judge's discretion, I think the public should be barred even when it is introduced in evidence before the jury in some cases, but that would not necessarily have to be written into the bill.

Mr. WILLIS. In that respect you would be more cautious than in the normal run of cases involving voluntary or involuntary confessions?

Mr. WHATLEY. Yes, sir. And in the remotest possibility that the recording did contain an actual confession, I do not believe it would violate the strict interpretation of the constitutional prohibition against self-incrimination.

Mr. WILLIS. If what?

Mr. WHATLEY. If the recording should by chance contain an actual confession of the commission of the crime. I think it could be introduced in evidence over the objection of the defendant and it would be constitutional under the provision——

Mr. WILLIS. That was my next point. Would that be constitutional?

Mr. KEATING. It would be in the nature of an admission against interests, I suppose. I believe the constitutional prohibition as to self-incrimination was to the effect that a witness could not be compelled to give evidence in a formal proceeding against himself, but if he had made a statement to Mr. X openly that "I committed murder," that could be shown in evidence.

Mr. WILLIS. Yes, under normal rules. I suppose those rules of evidence would govern here.

Mr. WHATLEY. I should hope, Mr. Chairman, also that the bill reported by the committee would place strict control and prohibition against wiretapping by private citizens.

Mr. WILLIS. At this point may I ask another question. We were discussing what usually happens in a criminal case, distinguishing between forcing a man to take the stand before the jury and compelling him to testify, as against the admissible evidence of a voluntary admission against interest off the stand, which is admissible. Now, a constitutional question in this case is this: Would the tapping of the wire constitute compelling him involuntarily to testify against himself? Are there any decided court opinions on that subject?

Mr. WHATLEY. I am sorry to admit I have not studied the constitutional aspects in detail on that, but I simply believe that a reading of the phrase of the Constitution covering that, it is quite evident it applies to acual testimony in courts and not other evidence. In controlling and prohibiting wiretapping of private citizens, I hope the committee might find some manner such as the regulation and sale of the wiretapping equipment by requiring a Federal license for the purchase of such equipment and prohibiting any purchaser from transferring it to any other person or even letting it out of his control without the prior consent of the Federal Government.

Mr. KEATING. We do not want to set up some new Federal agency here to——

Mr. WHATLEY. I think the FBI could very well do that with very little additional personnel.

Mr. KEATING. The FBI does not want to——

Mr. WHATLEY. I daresay they do not want to, but I hope you would require them to by the bill. It is beyond the scope of the bills, of course.

Mr. KEATING. I think that will probably be a matter for the Interstate and Foreign Commerce Committee.

Mr. WHATLEY. May I just add again one other word, that I agree with the Attorney General's position that this should be made retroactive and I agree with the statement of the Assistant Attorney General when he says that making possible prosecution in certain cases where an indictment has been undertaken because evidence was obtained by wiretapping heretofore. He states that this does not offend the prohibition against ex post facto laws for the test as to whether a statute is ex post facto is not whether it changes the rules of evidence, but whether it authorizes a conviction upon less proof in amount or degree than was required when the crime was committed.

I cannot understand any objection to that. I would hope also that an additional amendment could be added which may not be strictly germane, but would repeal outright the statute of limitations against crimes involving national security generally.

Mr. KEATING. Thank you.

Mr. WHATLEY. I am very grateful for your time, sir.

Mr. KEATING. Mr. Miles F. McDonald. We are happy to have you here and we appreciate your assistance in this proceeding. Mr. Celler said he wanted to be here and introduce you to this committee, but I am sure that is not necessary. We are all familiar with your activities and we know you are an officer of the National Association of Prosecuting Attorneys.

Mr. MCDONALD. I am the present president.

Mr. KEATING. We are very happy to have you here to give us what help you can with regard to these bills. Do you have a prepared statement?

STATEMENT OF MILES F. McDONALD, DISTRICT ATTORNEY OF KINGS COUNTY, BROOKLYN, N. Y.

Mr. MCDONALD. No; I have no prepared statement. I am quite prepared to talk on any part of it that you would like me to talk about.

Mr. KEATING. If you will proceed, we are particularly interested, and I have no doubt you will cover the way in which the New York statute has worked in the State of New York.

Mr. MCDONALD. The New York statute is contained in section 813–A of the Code of Criminal Procedure. It provides that a judge of the supreme court or of the county courts, or of the court of general sessions in the city of New York—which is the county court for the county of New York, but it retains its old early American name—may issue an order ex parte for the interception of telephone or telegraph communications upon an application by either the district attorney—which includes his assistants; the attorney general of the State—which includes his assistants; or a police officer above the rank of sergeant.

The affidavit of the applicant must recite that a crime has been committed and that there is reasonable grounds to believe that evidence concerning the perpetrators of the crime or of the commission thereof will be obtained by intercepting these particular telephone communications.

Mr. WILLIS. It speaks only of the past? Has been committed or about to be?

Mr. MCDONALD. Has been committed. I think for your purposes—and that is one of the things I was going to discuss—it should contain, particularly for anything as important as sabotage and treason, a statement to the effect that a crime is about to be committed. We proceed this way. First the affidavit usually contains some evidentiary fact to give the judge a basis for granting it. You cannot just say that a crime has been committed. You must specify what the crime is. Then you must say what the relationship of the person to the crime is, why you suspect him and why you believe that you can obtain evidence over that wire.

I brought here a typical affidavit and order. I left it in blank as far as the names and the telephone communications are concerned. It was one that has been used by me in connection with the murder of Arnold Schuster, and this describes why we think we can obtain evidence concerning the Schuster case by intercepting certain telephone

communications. It tells in very brief form the evidence to date that would lead us to believe that those communications should be intercepted.

Mr. KEATING. I think it would be well to make that a part of the record. This is an affidavit and order which you have actually used with the names left blank?

Mr. MCDONALD. That is correct.

(The order is as follows:)

SUPREME COURT: KINGS COUNTY

In the Matter of Intercepting Telephone Communications Being Transmitted Over Telephone 0–0000

John J. Meenahan, an acting captain of the Police Department of the city of New York, being now present before me, and it appearing from his affidavit sworn to the 6th day of November, 1952, that there are reasonable grounds to believe that evidence of crime may be obtained and the apprehension and arrest of John Mazziotta effected, by intercepting telephone communications being transmitted over telephone instrument bearing number ( ) and that the ends of justice will be best served by the interception of messages, it is

ORDERED that the police commissioner of the city of New York or his duly authorized agents be and they are hereby authorized and empowered to intercept, listen to, overhear and make copies of any and all telephone communications made to and from or being transmitted over the telephone instrument bearing number ( ) located at premises ( ), Brooklyn, N. Y., and listed in the records of the New York Telephone Co., under the name of ( ) Tavern, for the purpose of obtaining information leading to the arrest and apprehension of John Mazziotta, and it is further

ORDERED that the police commissioner of the city of New York or his duly authorized agents be and they are hereby authorized to cut, break, tap, and make connections with any and all wires leading to and from telephone instrument bearing number ( ), and to do all things necessary to permit the communications being transmitted over the said telephone instrument to be intercepted, and it is further

ORDERED that this order shall be effective until the 1st day of May 1953.

Dated: Brooklyn, N. Y., November 6, 1952.

PHILIP M. KLEINFELD,
Justice of the Supreme Court.

SUPREME COURT: KINGS COUNTY

In the Matter of Intercepting Telephone Communications Being Transmitted Over Telephone 0–0000

STATE OF NEW YORK,
County of Kings, ss:

John J. Meenahan, being duly sworn, deposes and says:

That he is an acting captain of the Police Department of the City of New York and commanding officer in charge of the Brooklyn west homicide squad.

That on March 9, 1952, at 9:10 p. m. one Arnold Schuster was shot and killed in front of 907 45th Street, in the Borough of Brooklyn, city of New York. That deponent's detective squad together with others have since been conducting an intensive investigation to apprehend the person or persons guilty of the said homicide.

That on February 8, 1952, the Danish ship *Olaf Maserk* was docked at pier 22, Brooklyn, N. Y., taking on cargo. Part of the cargo placed in a locker located in the No. 3 hatch of the said vessel consisted of .38 caliber Smith-Wesson chief's special revolvers. During the loading of the revolvers 13 were stolen. Each revolver was marked with a serial number. It has now been established that the murder weapon is 1 of the 13 revolvers stolen. Examination of the longshoremen engaged in the loading of the locker of hatch No. 3 of the vessel led to the thieves of the said revolvers and investigation shows same or all of the revolvers were sold to John Mazziotta by the thieves. The said John Mazziotta has

been missing from his home at 1524 West Fifth Street, Brooklyn, N. Y., since the early part of April 1952.

It is deponent's belief that the apprehension of the said John Mazziotta is of prime importance in the breaking of the aforesaid case. During the course of deponent's investigation in this matter, deponent has received information from a confidential source that John Mazziotta visits the ( ) tavern which is located at ( ) in the Borough of Brooklyn. The said cafe is owned by one ( ).

That the telephone instrument bearing No. ( ) is maintained at the ( ) tavern at the aforesaid address. It is your deponent's belief that the said telephone instrument is being used by John Mazziotta in conversations with ( ) through whom he maintains contact with the underworld and by reason thereof there are reasonable grounds to believe that evidence of crime may be thus obtained and the apprehension of John Mazziotta may be effected if the police commissioner or his duly authorized agents be permitted to intercept messages being transmitted over the said telephone instruments.

WHEREFORE deponent prays for an order permitting the police commissioner of the city of New York, or his duly authorized agents of the Police Department of the City of New York, to intercept any communications transmitted over the telephone instrument bearing the No. ( ), which instrument is located at ( ), Brooklyn, N. Y., and listed in the records of the New York Telephone Co. under the name of ( ) tavern, and permitting the police commissioner of the city of New York, or his duly authorized representatives to cut, break, tap, and make connections with any and all wires leading to and from said telephone instrument.

Your deponent further requests that the said order be effective up to the 1st day of May 1953.

No previous application has been made for the relief sought herein.

JOHN J. MEENAHAN.

Sworn to before me this 6th day of November 1952.

FRANK DI LALLA.
Notary Public, State of New York.

Mr. KEATING. We now have with us Congressman Celler, who requested the opportunity to introduce you to the committee. I would like to recognize him for that purpose at this time, although we are already under way.

Mr. CELLER. I am sorry I was delayed. I had some long-distance calls. I just want to say to the committee I am more than pleased to see my dear friend and the distinguished district attorney of Kings County, from whence I come, coming here to give enlightenment on this very vexatious subject, and concerning which there are several bills, one of my own and one of yours, Mr. Chairman. I would like to say that Miles—he is familiarly known as Miles, as we call him—is a fighting, fearless, and most efficient district attorney and one I am sure who will receive most respectful attention at the hands of this committee.

I am sure he will be among those who is very expert on the subject of running down crooks, malefactors, and those who commit espionage and sabotage. He knows the story. I am sorry I did not hear the fore part of his statement. I will remain to hear the rest. We are very happy to have you here, Miles.

Mr. MCDONALD. I am delighted to be here, Congressman, and I am particularly delighted to appear before a committee of which you are a member. We have known each other for a good many years, and we are immediate neighbors, living only a block apart.

The way we proceed, then, is we prepare an order in 5 copies. We go to a judge of the supreme court or to the county court. Usually, unless the matter is before a grand jury in which we are investigating, we go to a justice of the supreme court. The senior judge of the su-

preme court in our county usually designates one judge to handle all those matters. Usually it is a judge who has been in the field of law enforcement so he is most familiar with the type of work.

We present the affidavit and order to him. I have an office rule that no order for interception of telephone communications may be submitted by any assistant, nor may any be prepared for a member of the police department and submitted for the police department, unless I have personally examined it and approved it. The judge will naturally look to see if my initials are at the place for his signature, because I feel I have a responsibility to the court as well as to myself to make certain the court is not asked to sign an order that is not proper.

Mr. KEATING. And you do sometimes overrule an overzealous subordinate who wants to tap wires in a case where you do not think it is justified?

Mr. MCDONALD. That is correct.

Mr. CELLER. Is that the practice also in New York County?

Mr. MCDONALD. I do not think that the district attorney does it. It is either the chief assistant or the head of a particular department that would approve it. But an ordinary assistant is not permitted in any of the offices that I know of to just apply for an order at his own whim. He must get approval for it.

Mr. CELLER. Do you apply for these orders addressed to a supreme court judge in bulk? Do you get a number of them at one time?

Mr. MCDONALD. We never have a number. We may apply once for a number of wires at a particular time in one investigation. Let us assume that we are investigating a bookmaking shop. It is in a cigar store. There may be 4 or 5 pay phones in there. We may apply for all of them at once. But there are not a great deal of wiretap orders used. I think it was found that last year, or year before last, at the height of the investigations in my office and Frank Hogan's office, both offices combined in a whole year only applied for less than 100 wiretap orders between the 2 largest prosecuting officers in the East, and in the time when we were in the middle of investigations. Wiretapping is expensive; wiretapping is cumbersome, and it takes a lot of manpower. You only use it where you really have to get evidence in that manner. In the ordinary case wiretapping is not used.

You usually use it at a time when there is a continuing crime, where there is a conspiracy, where there is underworld machinery in operation. For the ordinary murder case or something like that, you do not use wiretapping unless it is to help apprehend the defendant. That is, sometimes you put a wire in his home to see if he is calling his wife or his family or communicating with them or something like that. But in the average case, wiretapping is not used. It is only used where there is a continuing conspiracy, and that is the only time it is really successful.

Mr. CELLER. Do any of the judges sign these orders for wiretapping in blank?

Mr. MCDONALD. Never.

Mr. CELLER. Do you know whether they do outside of Kings County?

Mr. MCDONALD. I do not think anyone ever signs an order in blank. It would be a direct violation because the judge must satisfy himself from the affidavit that there is reasonable grounds to believe that the crime has been committeed and that evidence will be obtained. The evil, I think, in wiretapping never comes in the legal wiretapping

where there is an order. The evil in wiretapping comes where there is no order and no one certainly should condone that. That is why one of the recommendations I had made to the State legislature was that they remove from there the right of a police officer of any rank to apply for a wiretap order. The prosecutor must apply for it. I think that would greatly limit the abuses to which it can be put, because a policeman can very well get an order for a legitimate tap and tap some other wire; then when he is caught, he made a mistake, he has tapped the wrong wire. I think an adequate protection would be to require the district attorney of the county to apply for the tap.

Mr. WILLIS. Does the order designate the wire to be tapped?

Mr. MCDONALD. Yes. I will tell you the story, if you want. We go with the 4 orders, and we have 4 signed originals. The judge keeps one and he does not file that as a record of the court. He does not go to the county clerk or the court clerk. He keeps that in his own private papers, so that he has that forever. He gives back to the district attorney three duplicate originals. We then go to the telephone company and present one copy to them, and then we ask them to give us the pairs. The pairs mean the point where the telephone wire that we want to tap comes out into a box where you can get at the terminals, and we have to know what two wires to attach one to the other in order to intercept a particular telephone, because there are thousands of wires.

Mr. KEATING. Does the telephone company get a copy of the affidavit or just the order?

Mr. MCDONALD. They just get the order.

Mr. KEATING. They have a method of security there, do they?

Mr. MCDONALD. In our investigation in the Gross case it did not prove too helpful because one of the stenographers who handled that in the telephone company had a boy friend who was a policeman who was selling the information to Gross, who was in turn peddling it to other bookmakers at $50 apiece. So you have difficulties with it even in that stage.

Mr. KEATING. Other than in that instance——

Mr. MCDONALD. I have never had any evidence of a leak other than that. That has been removed now because the telephone company has designated a particular man who is well familiar with our office. We do all our dealings with him and no one has to know why he has applied for the pairs, because we cannot operate unless we know the pairs from the telephone company. Then after they give us the pairs we must go into the neighborhood where the box is and find a suitable place in which to sit.

That is something I would like to come to a little later. We have to then make arrangements with some nearby tenant, owner, storekeeper, to permit our men to sit in his place of business and lead in the wires from the interception and then we sit there usually with a recording machine, with a machine that also indicates what number has been dialed, because you must know the phone number, and you take the waves from the dialing of the phone which records on a tap which can be translated into an actual number.

Mr. KEATING. Do you tell him what you are up to?

Mr. MCDONALD. We have to tell him we are there for a particular purpose, what we want to do. That is the weakness in our present system. That weakness is largely caused at the present time by the

present Federal Communications Act, 605, that you expect to amend. During our investigations of the Gross case we made a different arrangement. Whenever we tapped a wire we leased a wire from the point of interception back to our own office, where we had a central interception bureau with a switchboard, recording tables, stenographers. That obviated the necessity for having people in the area. It might be remembered that during the Gross case as well I tapped a wire in Nassau County, and within 15 minutes after my men were on the wire my police officers were arrested; but they could not find the bookmakers, although they had been operating for 6 months. But they did arrest my men 15 minutes after they were out there for sitting on the tap.

Mr. KEATING. Arrested them for what?

Mr. MCDONALD. Wiretapping. They let them go as soon as I ultimately produced the order. But if we could lease a wire back to our own office, you would obviate the necessity for sitting a tap. It would save a great deal of manpower. It would give you a central agency where you hear one call coming in from one part of the city to another part. One man will call up and say, "What time is it to be?" And the other fellow on one line will say, "8 o'clock." At some other phone a man will say, "Where is it going to be?" and they will say, "At Joe's place." If you can gather it into a central office, you get all the information at once. But when you are in the field, you do not.

Yet the telephone company after the Gross case refused to give us any further service of that type, saying it would be a violation for them of the Federal Communications Act; that they are not authorized by the act to assist us in any way. While we may tap, they may not assist us and that the Federal legislation has preempted the field. So our hands are now tied in that respect.

When you go into a waterfront area to tap a wire, you are not there half an hour before every character in the neighborhood knows that you are there. You cannot buy secrecy. The only way you can buy it is by that. That is one of the things I would recommend that this committee study—an amendment to section 605 to the effect that wherever a sovereign State has granted permission to its law-enforcement agents to intercept telephone communications, the communications companies be permitted to cooperate with them.

Mr. KEATING. Technically, Mr. McDonald, we do not have before us an amendment to the Federal Communications Act. This committee would not have jurisdiction over that. It would fall within the jurisdiction of the Interstate and Foreign Commerce Committee.

Mr. MCDONALD. Your report might show something on it.

Mr. KEATING. That is right, our report would deal with it.

Mr. MCDONALD. I have here a resolution from the National Association of Prosecutors, adopted 2 years ago, to that effect which I would like to leave with you. It also deals with the general proposition, I think, of intercepting telephone communications for your purposes and urging very strongly that the Federal Bureau of Investigation and the various Army intelligence services be granted that power because we think it is an essential weapon in the fight against the underworld and in the fight against treason and saboteurs.

Mr. KEATING. We will be glad to make that a part of our record at this point.

Whereas the National Association of County and Prosecuting Attorneys is acutely aware of the illegal practices by which the enemies of our country, both internal and external, have employed the means of telegraphic and telephonic communication; and

Whereas the existing Federal laws have in many instances made these means of communication weapons which are continuously being used by our enemies with impunity and immunity and, at the same time, impose stringent limitations on the Federal Bureau of Investigation and other governmental law enforcement agencies; and

Whereas we firmly believe that the security of our country and the safety of its citizens demand that the Federal Bureau of Investigation, the directors of military intelligence of the respective armed services be granted the power (under proper supervision of the Attorney General of the United States) to intercept such communications in cases involving treason, espionage, sabotage, and other crimes against the internal security of our Nation: Therefore be it

Resolved, That the National Association of County and Prosecuting Attorneys, in convention duly assembled at Highland Park, Ill., on the 11th day of August 1951, earnestly advise and strenuously urge the Congress of the United States to enact the legislation now before it granting such authority to the end that our American heritage of personal liberty may be secured from foreign ideologies sought to be imposed upon us; and be it further

Resolved, That the Congress of the United States make an appropriate amendment to the Federal Communications Act to provide that nothing therein contained shall be deemed to be a limitation upon the powers of the law-enforcement agencies of the sovereign States to intercept telephonic and telegraphic communications or to employ the services of these respective public utilities in furtherance of the performance of their official duties, in accordance with the laws of the said several States.

Mr. WILLIS. Does the New York statute permit wiretapping for all types of crimes?

Mr. MCDONALD. As long as a crime has been committed; it must have been committed. It does not include an offense, but it does include misdemeanors such as gambling, prostitution, and it goes as high as murder.

Mr. WILLIS. Will you now go through the admission of that record in evidence before a jury? Describe that.

Mr. MCDONALD. You call a police officer on the stand or perhaps an assistant district attorney, and he will produce the original order. You will say, "Are you an assistant district attorney of the county of Kings?" "I am." "Have you an order duly made and entered by the Honorable Judge Kleinfeld, of the supreme court?" "Yes." "I ask you to produce it. I offer it in evidence." That order is the original order signed by the judge. "Pursuant to that order did you at such-an-such a day go to the New York Telephone Co. and did you give them a copy of the order?" "I did." "Did they advise you the pairings of the telephone listed in that order?" "They did." "Then what did you do?" "I went out to a box located at the rear of 346 South Fourth Street. I located path No. 67 and path No. 42. I connected the two together with a wire and connected the telephone instrument to it. I then connected that wire not only to my instrument but to a recording set, and I and my partner sat at that phone from 8 o'clock until such-and-such time. I made a recording of all the communications and conversations that came over it. Then at 8 o'clock I left and I turned it over to someone else."

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Then you call the other man so you prove the continuity.

Mr. WILLIS. Is that a plain record or stenographic notes?

Mr. MCDONALD. We can do it both ways. Sometimes we use stenographic notes and sometimes we use a recording device. It is better to use a combination of both, and if you have the recording device, so much the better. Recording devices are few and far between, and you have to apply them where you can.

Mr. WILLIS. Going a little bit further, how is it admitted to the jury?

Mr. MCDONALD. You ask the policeman, "Did you make a telephone transcript of the conversations?" "I did." "At about 4:20 p. m. on such-and-such a day did you have a telephone call?" "Yes, I did." "What was it?" "Well, there was a dial call going out and the following number was dialed. I received that from this tape," and he produces the tape showing the number that was dialed. "I listened to it. It was a female out voice and a female in voice. The female in voice I have subsequently been able to identify by speaking with the defendant A. I talked to her in the district attorney's office. I had known her previously, and I now say that the voice I heard at that particular telephone conversation was the voice of this defendant."

Mr. WILLIS. Is the jury in all this time?

Mr. MCDONALD. The jury hears all this; yes, sir.

Mr. WILLIS. Are not the lawyers jumping up with all kinds of objections in the meantime?

Mr. MCDONALD. No.

Mr. WILLIS. Go on.

Mr. MCDONALD. Then they start the questions and answers. "Did you hear this? Will you recite it?" Then the judge frequently says, "Have you a record of it?" "Yes." "Show it to counsel for the defendant." He examines it to see whether there is any matter which is prejudicial, which is improper.

Mr. WILLIS. That is the point I want to reach.

Mr. MCDONALD. Then if there is, the jury is excused. Counsel confer at the bench; the judge makes his rulings for the record. The assistant district attorney is instructed as to what questions he can read and what answers he can read and what ones he cannot.

Mr. WILLIS. What questions are excludable and under law and jurisprudence. Let me ask you the direct question: Have all phases of this subject been approved by the courts? By that I mean this. You know that confessions to be admissible must be voluntary; and whether voluntary or not, it is tested outside the jury. Has the question been passed on by the courts as to whether or not a conversation listened to by a third party would violate the rules as to whether it is voluntary, and the rules of hearsay? After all, there is no opportunity to cross-examine there. This is a new field for me.

Mr. MCDONALD. I will take it this way, first on hearsay. If the identification is made that the voice is the voice of the defendant, the question of hearsay is eliminated. It is the defendant's own declaration; it is not a confession. It would be an admission. The same rules of law would apply as if anyone else testified as to an admission made by the defendant in any course of a proceeding.

Mr. WILLIS. The normal rules of evidence——

Mr. MCDONALD. The normal rules of evidence apply in all cases.

Mr. WILLIS. Has this specific point been passed on, that it is voluntary? In other words, a conversation between the criminal and his friend or whoever might be on the other end of the line may be voluntary as between those two; but does this snooping in here by a third party—and I am using this word in the legal sense—make it involuntary?

Mr. MCDONALD. It does not make it involuntary.

Mr. WILLIS. That has been passed on by the courts, including the Federal courts?

Mr. MCDONALD. I am not quite as familiar with the Federal, but I would say this, that the question of voluntary comes under the definition of the word. Did he do it freely? He was not being coerced? It is not a question as to whether or not you intercepted without him knowing it. If, when he said it, he said it as a voluntary thing, then it is admissible as being voluntary. But if a man stood behind his head with a gun at the time he was having the conversation, it would no longer be voluntary. The same rules apply.

Mr. WILLIS. The same rules we are familiar with?

Mr. MCDONALD. Yes.

Mr. WILLIS. And it has been passed on by the New York courts anyway that this interception of a third-party device——

Mr. MCDONALD. Does not violate any constitutional right of the defendant.

Mr. KEATING. Mr. Foley, at this point, because this constitutional question is important, have you run on to Federal cases holding the same way?

Mr. FOLEY. That is right, sir; as recent as about 3 months ago.

Mr. MCDONALD. I would say that Federal courts, in reviewing decisions of State cases, have held that it was proper.

Mr. WILLIS. I mean a review of a State court by the Supreme Court.

Mr. MCDONALD. That has been held to be perfectly legal, perfectly voluntary.

Mr. FINE. Did you make that clear, that the intercepting officer must recognize the voice and identify the speaker?

Mr. MCDONALD. That is exactly correct. He must.

Mr. FINE. He must do that?

Mr. MCDONALD. That is right.

Mr. WILLIS. That is laying the foundation.

Mr. MCDONALD. That is right.

Mr. KEATING. Having done that, there is no question in your mind about the constitutionality of the procedure?

Mr. MCDONALD. No. Our own cases have been passed upon.

Mr. KEATING. Have your own cases gone to the Supreme Court?

Mr. MCDONALD. The Supreme Court of the United States; yes. There was one very recently, about 3 months ago.

Mr. FOLEY. There was 1 in Texas about 3 months ago where the same question arose.

Mr. FINE. You say under the Constitution; do you mean even the fifth amendment?

Mr. MCDONALD. That is correct. The only thing that prevents it now in the Federal jurisdiction is the Federal Communications Act.

Mr. WILLIS. In what way, directly or indirectly?

Mr. McDONALD. It directly prohibits the disclosure of any evidence obtained by wiretapping. It does not stop the tapping. It stops the disclosure.

Mr. FOLEY. That is the Weiss and Nardone cases.

Mr. McDONALD. It is the Coplon case as well.

Mr. WILLIS. Have the courts passed upon the necessary safeguards of the legislation itself? For instance, the bill by my colleague here from New York requires a court order. Has that been passed on as a necessary safeguard to make it constitutional, or would it be constitutional without it?

Mr. McDONALD. That has not been passed on. The court cannot pass on a bill that it does not have. It held that this one was constitutional. I might say in my own opinion that is a necessary part of proper interception, that it should not be left to the prosecuting attorney alone to determine when he has a right to tap a wire.

Mr. WILLIS. That is very interesting and very important. That is what your experience with that law tells you is important?

Mr. McDONALD. Yes.

Mr. WILLIS. Will you tell us why? We have two versions here. Two bills make the court order necessary; the others do not. Why do you think the court order is necessary?

Mr. McDONALD. I think prosecutors, myself included, can be overzealous; and I think you sometimes get to a point where you have pretty good suspicion, but no evidence, and you want to rush in and get a wiretap. You think you will solve everything with a wiretap and you are inclined to do it; it is a shortcut. It is not an infringement on any right, but it is an invasion to a certain extent of a person's privacy.

I think someone who was disinterested in the success of the prosecution ought to be a safeguard that will go in and say, "You have not got enough." One of my earliest experiences with that was in a case where we had a murder case and we had a missing witness. The witness had been spirited away; I was convinced of that. I went in to old Judge Smith, who was a former assistant district attorney and a very learned lawyer, and asked him to permit me to tap a wire where I thought I could locate this witness. He said, "No, sir; you are not going to get evidence of the crime. All you are going to get is evidence where this witness is, and that is not provided for in the statute." He would not let me tap the wire.

Subsequently we did find evidence that would warrant us in making that application, and we made it. Luckily, we got the witness in 24 hours. But the judge is a safeguard. He is a check and a balance that prevents you from being too rash.

Mr. WILLIS. Is a court order pretty close to a warrant?

Mr. McDONALD. It is practically nothing else.

Mr. WILLIS. The Constitution, before you enter a home, requires just such a device, except that part was in the Constitution. In those days we did not have telephones and we could not talk about that, but we did have experience in searching and entering a man's home. The Constitution makes it necessary to get a court order, to get a search warrant. Is this not almost entering a man's home? Do you not think this device might make the difference between constitutionality and unconstitutionality?

Mr. McDONALD. I do not think it makes it constitutional or unconstitutional, but I do think that it is an appropriate safeguard; and I think that the order that we obtain is nothing more nor less than another form of a warrant for search and seizure. But I do think it is necessary.

Mr. KEATING. I want to say I emphatically agree with you on that. It seems to me it does give an added safeguard of a disinterested person, which, while perhaps not necessary to the constitutionality of the legislation, is highly desirable.

Mr. FOLEY. In your experience, Mr. McDonald, have you ever had occasion in laying a foundation for the admission of this evidence for anybody to try to question the validity of the court order?

Mr. McDONALD. No.

Mr. FOLEY. Therefore, under the system in New York, you merely put the order in and that satisfies the court as to the reasonable grounds; there is no collateral attack on it?

Mr. McDONALD. No. The only attack is usually on the identification of the voices.

Mr. FOLEY. You, being a former Federal district attorney, know that in these security cases there is the big question of how far you can go in showing your hand in a courtroom. Under the bill that the Attorney General proposed, 5149, there is no court order. I have raised the question with the Assistant Attorney General whether or not, under the provisions of his bill, he would have to show in court, first, that it was done under the express approval of the Attorney General, and, secondly, that it was connected with a security investigation. And once he puts that evidence in, then it is subject to cross-examination. That is exactly what happened in the Coplon case. Is that not so?

Mr. McDONALD. Yes.

Mr. WILLIS. I did not follow the point you were driving at.

Mr. FOLEY. The point is that under a court order you merely take your copy of the original order and put it in. That satisfies the court. That limits it. It does not go behind the order. However, as you well know, under 5149, there is no court order. So, to meet the provisions to be admissible, he has to show, 1, the approval of the Attorney General; and 2, that it was connected with a security investigation.

The danger in this thing is that there are a lot of things they do not want to reveal in court in this type of case. That was the problem in the Coplon case because they did get the records of wiretapping and spread the whole thing before the public. There are certain cases where they are afraid because of that reason.

Mr. KEATING. In other words, your point is that the court order, rather than being a dangerous thing as giving more information, is a safeguard in that the court order is final and they do not have to go beyond it. Whereas, under the Attorney General's suggestion, without the court order, he would have to go into matters which he would not want to go into in order to get his evidence?

Mr. FOLEY. That is correct.

Mr. McDONALD. He would have to show he had a prima facie case in which to issue the order in the first place.

Mr. KEATING. In order to get his evidence admissible?

Mr. McDONALD. To get his evidence in, he would have to show compliance with the statute.

Mr. KEATING. I think possibly that was not in his mind when he was here before us. That particular question was not brought to the attention of the Attorney General. His fear, when he appeared before us—and I appreciate your views on this—was that if a court order were required, as in H. R. 477, it might result in leakages. You had a leakage in the Gross case through the telephone company.

Mr. McDONALD. They are going to have that, too, because they are not going to be able to maintain an entire plan of the telephone company wiring system; and if they are going to tap a wire, they are going to have to go to get the pairs from the phone company the same as I do.

Mr. KEATING. That is right. You cannot avoid that.

Mr. McDONALD. That cannot be avoided unless you have a complete map up to date every minute of the day of every wire in the telephone company.

Mr. KEATING. But so far as leakages in the court are concerned, have you ever had any bad experience?

Mr. McDONALD. Never.

Mr. KEATING. What does the judge do after he signs this order? Does he lock it up?

Mr. McDONALD. He puts it in his own safe in his own chambers.

Mr. KEATING. One judge is chosen for that? That is not in the law, but it is a matter of practice in the various judicial districts?

Mr. McDONALD. A matter of practice.

Mr. KEATING. He locks up that order in his safe. That is the official record in his safe?

Mr. McDONALD. That is right, and he gives us three originals which he has also signed, with his own signature.

Mr. FOLEY. Mr. McDonald, on that point, do some of the judges not follow this practice? They actually put it in an envelope, seal the envelope, and sign it across the back?

Mr. McDONALD. Sign it across the flap.

Mr. KEATING. Of those three orders that come back to you signed——

Mr. McDONALD. I keep one; the telephone company gets one; and the police officer who is in charge of the detail sitting the tap has the other one so he may show it if another police officer comes around and says, "What are you doing here?" "I have got an order permitting me to do it."

Mr. FOLEY. But the order is just the authority——

Mr. McDONALD. That is right. We take the affidavits off.

Mr. WILLIS. On the question of establishing the foundation to proceed with the admission of the record of conversations in evidence, you say that the mere introduction of a court order is a first step?

Mr. McDONALD. That is correct.

Mr. WILLIS. In the rough and tumble criminal case—and those are the ones that challenge a lawyer—there are no holds barred. Suppose I say, "Here is a court order. But I want to see the affidavit submitted to the judge. I want to cross-examine the guy who initiated this thing. Let us see whether there was a crime or whether it was a fishing expedition. Let us see what they swore to at that time as against what they are swearing to today." Certainly a lawyer would take a stand and try to probe into that.

Mr. McDONALD. No, for this reason, Congressman. If we tap a wire for any reason, as long as the tap is lawful when we make it and we find evidence of other crimes other than the one we are looking for, we are entitled to use the evidence. If I go in a bookmaking case to tap a wire and find evidence of a murder, it is entirely disconnected and the only person who can pass upon it originally is the judge. It is within his discretion as to whether or not the evidence is reasonable. So you have no attack behind the order. The order is granted; that is all. They are entitled to it. You can call the judge, if they challenged his signature to the order and said it was a forged order, and he would say, "That is my signature." That would be the end of it.

Mr. WILLIS. The reason I asked that question, in the light of what Mr. Foley said, it seemed your bill on reflection might accomplish the very things that the opposite view feared.

Mr. KEATING. That is right. I did not follow that myself a while ago.

Mr. WILLIS. If the court order is the starting point and you cannot go behind it——

Mr. KEATING. In other words, the court order is conclusive. Are there cases in New York which have held that, where attorneys have tried to go behind the court order, they may not do so?

Mr. McDONALD. I do not know. I have never heard of it being challenged, not in my time.

Mr. KEATING. In other words, the defense lawyers——

Mr. McDONALD. Never challenged it; never attempted to do that.

Mr. FOLEY. On the contrary, is it not a fact that most of the time they concede your grounds?

Mr. McDONALD. I will say this. It may have happened in the early days. But after a practice grows up and they find that it has been overruled once and overruled twice, and ultimately passed upon, it does not go any further.

Mr. DONOHUE. When you go before a judge seeking such an order, do you request that order based upon oral evidence?

Mr. McDONALD. You can take a look at the one in the record, and that will answer your question.

Mr. DONOHUE. Not having time to go through all of it, I am wondering if you could briefly answer my question.

Mr. McDONALD. In that one we said that a certain ship, the *Olaf Maserk*, docked at a certain dock in Brooklyn, had a shipment of Remington arms; that 8 revolvers were stolen from 1 packing case and 5 were stolen from another packing case, and the numbers; that 1 of these guns was the weapon that was used to kill Arnold Schuster; that we have the man who stole the guns; that the man who stole the guns told us he gave the guns to X, and we wanted to intercept a telephone communication on X's home.

Mr. DONOHUE. Is the evidence you give submitted to the judge orally or in writing?

Mr. McDONALD. In affidavit form. It is in the affidavit attached to the order and is made a permanent record.

Mr. DONOHUE. Do I understand from your answers to Mr. Willis' questions the facts set forth in the affidavit cannot be attacked?

Mr. McDONALD. That is correct.

Mr. DONOHUE. In other words, assume a case where certain facts alleged in the affidavit turned out not to be a fact, and that fact would be important enough to prevail upon or convince the judge that the order should not be issued, do you not think an injustice would be done an alleged defendant?

Mr. MCDONALD. No, because the telephone communication would only have been disclosed if——

Mr. DONOHUE. Pardon me, Mr. McDonald. The affidavit is submitted before any wiretapping?

Mr. MCDONALD. That is correct. But I say do not see how the defendant would be hurt because it would only be if you actually obtained evidence. You would actually have had to have evidence that you wanted to introduce.

Mr. DONOHUE. But you would not get the order which would authorize you to tap the wires and get that conversation.

Mr. MCDONALD. That is correct.

Mr. DONOHUE. If a certain fact alleged in the affidavit was not a fact——

Mr. MCDONALD. The only safeguard you have in that particular case is the same safeguard you have in every other case where an affidavit is submitted for any ex parte order—the integrity of the person who signs the affidavit. That is one of the reasons I suggested that the police should be excluded and it should be pinned down to an assistant district attorney or, in your case, to an Assistant Attorney General of the United States or a United States attorney. I do not believe in giving it to the law-enforcement agents themselves. I do not believe even the FBI ought to have it. They ought to make an application through a member of the bar to a court of record.

Mr. FINE. When you say the order is conclusive you do not mean it is conclusive in a legal sense. It could be attacked, I suppose, by an energetic and enterprising lawyer?

Mr. MCDONALD. I do not believe so, Congressman. I think once the order is granted, the only question then is whether the evidence is admissible.

Mr. KEATING. It could be attacked directly by a motion to vacate.

Mr. MCDONALD. A motion to vacate the order.

Mr. KEATING. But not collaterally in the prosecution?

Mr. MCDONALD. As a motion to preclude where evidence has been obtained without a lawful search.

Mr. FINE. Except as a matter of practicality, you could not know that there was an order until after the wiretapping was accomplished and the trial was had and the order was offered in evidence. Would you have to go back to the motion part of the county court and make a motion, or does the supreme court make a motion to vacate?

Mr. MCDONALD. I think you would. You would know, because in the preliminary hearing where the evidence is essential, it is disclosed usually in the preliminary hearing, so they would know in the magistrate's court before it even got to the grand jury that a wire had been tapped. Then you can make it before your trial.

Mr. FINE. Before the trial. We are back at the motion part of the county court or the supreme court, and a motion has been made. Certainly the defendant's counsel has the right then or the opportunity at that time to attack the facts, as Mr. Donohue was trying to

point out—to attack the facts which were contained in the original affidavit as not being true.

Mr. McDONALD. The same as you would under a writ of search and seizure, but not at the trial. I think it would have to be a motion to vacate the original order, or a motion to suppress or preclude evidence.

Mr. FINE. On the ground that no crime had been committed pursuant to the facts stated in that affidavit?

Mr. McDONALD. That is right. Or there was not reasonable grounds at that time to believe that evidence could be obtained.

Mr. WILLIS. And the same rules that are applicable to going behind a search warrant would apply to this situation?

Mr. McDONALD. That would be my belief; yes, sir.

Mr. FINE. How would you know what was contained in the affidavits if you did not get a copy of it? Do you get a copy in the magistrate's court?

Mr. McDONALD. No.

Mr. FINE. How do you know?

Mr. McDONALD. We would have to make an application to the court, I believe, to see it.

Mr. KEATING. The same way you make application to see the minutes of the grand jury?

Mr. McDONALD. That is right.

Mr. FINE. And those are usually denied?

Mr. McDONALD. No; they are not. They are all too frequently granted, except in Federal courts. Federal courts never grant them. In the State courts they are granted quite frequently.

Mr. KEATING. In other words, if you showed facts to the court which tended to negative the propriety of issuing this order, the court would take the affidavit based upon the order and your facts and would determine whether the other side should be permitted to see the affidavit?

Mr. FINE. The difficulty, Mr. Chairman, that I envisage is: How would you know what facts they produce and what facts to put in an affidavit until you have seen the affidavit containing the facts?

Mr. McDONALD. The same way you do in a grand jury room. "My client has told me such-and-such, that this crime never had been committed, that he had no part in it, there was no grounds to believe that he was connected with it, and that he never used his telephone for that type of purpose."

Mr. FINE. Would that be enough?

Mr. McDONALD. It is enough in the ordinary application to inspect grand jury minutes. "My client tells me such-and-such. I have talked to the people who testified."

Mr. FINE. That is different. There you have an opportunity to know who testified before the grand jury.

Mr. McDONALD. You do not have the opportunity unless you find out because the witnesses are no longer listed on the back of the indictment. That was amended about 1938.

Mr. FINE. I can see the difficulty of ascertaining those facts and I was just wondering whether or not they should be——

Mr. McDONALD. There are difficulties.

Mr. FINE. I was just wondering whether or not there should be a safeguard.

Mr. McDonald. I have never seen any case where an innocent person was harmed by a wiretap order, and I have been at the business for 14 years. If you do not give the people the right to tap a wire, you are just giving the enemies of our country the right to a secret dispatch case that you cannot possibly find out about. And if they want to plan they will not sit in one room. They will go in three rooms and telephone each other, and you are just there with your hands tied. You are giving to the enemy every bit of technological progress. They can take a DC–6 and go from New York to California in 13 hours, and we have to follow them in a covered wagon.

There have been too many limitations placed upon law enforcement. District attorneys are not evil people who are going around and anxious to snoop on people's telephone conversations. God knows if they ever tapped mine they would find out conversations like, "What is the homework for tomorrow night, and how do you do the third example?" They could listen all day to that if they wanted to. We do not do it. We do not use it unless it is important, and we do not do it just for the purpose of snooping.

We only do it when we want to find out is this particular defendant guilty of this crime? It takes six men to work a wiretap. It takes one-third, almost, of my detective force to operate one tap.

Mr. Fine. Just to bring it to a conclusion, what you are really saying to us is this: That as far as any safeguard is concerned, the safeguard should be the application to a judge who will sign an order and not the safeguard of preventing or protecting a defendant against the issuance of that order.

Mr. McDonald. It has got to be the integrity of the man who holds the office and of the judge who passes on the order. You cannot legislate human elements out.

Mr. Willis. Does the New York statute say that wiretapping outside of the provisions of this act shall be unlawful?

Mr. McDonald. The statute does not, but the malicious mischief statute does; and that makes it unlawful to cut or intercept a wire. I think that statute itself should be strengthened. I would even make it unlawful for any person unauthorized by an order to have possession of wiretapping instruments. We found in the course of our investigation in the Gross case—again we come back to that because we had a tremendous experience with wiretapping there, both good and bad—that police officers without any instructions were buying their own wiretapping equipment. They would sit in on a telephone such as a coin booth near a baseball park or near a race track, and when they heard people call up to make a bet they would forward that to another plainclothes detective, who would then go and shake that bookmaker down. But that was all unauthorized wiretapping. With the authorized wiretapping you do not have any trouble. But until you authorize it, you are going to have trouble with unauthorized wiretapping.

Mr. Willis. The reason I asked this question is, under the general law of New York, the malicious mischief statute, the wiretapping outside of the provisions of this act is made unlawful. Now we are going into the Federal field. Is there a Federal statute comparable to the malicious mischief provisions. If not, would you recommend on

considered judgment that this bill should say, "This and this only is a field of legitimate wiretapping in Federal——

Mr. McDONALD. There is no Federal law, and I suggest there should be one.

Mr. KEATING. To penalize illegal wiretapping?

Mr. McDONALD. To penalize illegal wiretapping and even to make the possession of wiretapping instruments for an unlawful purpose a crime as well.

Mr. KEATING. You would go that far?

Mr. McDONALD. Yes, sir.

Mr. KEATING. That is not in any of these bills, but we certainly will take that under consideration.

Mr. DONOHUE. Tell me this, Mr. McDonald: In New York is evidence illegally obtained admissible?

Mr. McDONALD. Yes. A motion to preclude can be granted. It is admissible unless it has been suppressed prior to the trial. You can get an order to suppress, but it has to be done. A direct attack must be made on it prior to trial.

Mr. DONOHUE. Then do you feel that in any Federal legislation that would be enacted the same conditions should prevail, notwithstanding the information or evidence is illegally obtained? The court should be permitted to accept it as admissible?

Mr. McDONALD. I do not think you can do it under the Federal rule. Under the Constitution I do not think you can elect to that effect. I think evidence illegally obtained is going to be inadmissible evidence under the Federal rules if it violates the Federal Constitution. We do not have that problem in the State prosecution.

Mr. KEATING. That is a difference now between New York State law and Federal law?

Mr. McDONALD. That is right.

Mr. WILLIS. You have this very wide open back door, though; whereas the evidence thus obtained may not be used in evidence, the leads involved are always admissible in evidence and that is the important consideration as to whether we should go one step further and say not only is it not admissible in evidence, but whoever does it has committed a crime. I am not saying it should be.

Mr. McDONALD. I think that the leads which are followed up should be admissible in evidence. I think you are stretching out to a terrific point to protect people who have committed an unlawful act. After all, the paramount importance comes up sometimes as to which is greater, the right of privacy of an individual—which is not a constitutional right and no one can point out to me that it is—and the welfare of the country or the State as a whole. As Justice Jackson said sometime ago—speaking of the Supreme Court—"Unless the Court starts to temper its doctrine with logic and a little bit of commonsense, you are going to turn the Bill of Rights into a suicide pact." I think that is being done both by legislation and by court decision.

Mr. WILLIS. In other words, Mr. McDonald, you say that evidence, no matter how it is obtained, if it turns out to be true, should be permitted to be used against them?

Mr. McDONALD. I say you cannot do that under the Federal Constitution. In the State you can, but you cannot federally.

Mr. WILLIS. How do you differentiate between the State and the Nation?

Mr. MCDONALD. Because the fifth amendment prevents it in the Federal cases, and the fifth amendment does not apply to prosecutions in State cases.

Mr. DONOHUE. You do not have a similar provision in New York?

Mr. MCDONALD. In New York State, no. And the Governor has vetoed bills, as the Congressman knows, year after year that have been introduced to make it similar in New York. He has held each time that the paramount importance of the State is concerned. If you get evidence that shows a crime has been committed, then the protection of the statute does not apply.

Mr. DONOHUE. As a principle of logic, do you not think if evidence illegally obtained can be used against a defendant in a State, a sovereign power, it should be the same situation insofar as the Federal Government is concerned? In other words, steps should be taken to amend our fifth amendment?

Mr. MCDONALD. I make a distinction in different types of Federal cases. I think when the Bill of Rights was drawn, our country was young and they were still afraid of the redcoats rattling their sabers and banging on the doors and coming in with their armed might. For what? To collect taxes. The proprietary interest of the Crown. And where the tax interest of the United States is involved, I do not think you should have a right even to tap wires. I think where a proprietary interest only is involved, you should not have the right. I think the right should be limited to the cases where the national security is involved. I would say let them use the evidence even though it is illegally obtained, but not for the tax case.

Mr. KEATING. Mr. McDonald, may I ask you this, because we will have to adjourn shortly. Have you gone over any of the proposed specific legislation before us?

Mr. MCDONALD. Yes, I have.

Mr. KEATING. Do you have views on the relative merits of the various bills?

Mr. MCDONALD. On bill 477, I think it might be divided into two parts. One is civilian and one is military. I wondered if the right of the military to intercept telephone communications should not be limited in 1 or 2 ways, either to an emergency period, which would have to be created by a Presidential proclamation; or even if the military wanted to intercept a telephone communication, they had to make their application through the Attorney General.

Mr. KEATING. I think that is what the Attorney General would like. But the defense services feel they should do it directly.

Mr. MCDONALD. I do not think in ordinary peacetime the military should have a right to go around tapping telephone communications.

Mr. KEATING. It would be, of course, only in cases involving treason, sabotage, and so on, where our armed services personnel are involved.

Mr. MCDONALD. Suppose that is only an excuse, that the wires are tapped for that purpose. You catch a man tapping a wire; that is the only ostensible purpose, whereas in truth and in fact it is not.

Mr. KEATING. I appreciate your bringing that to our attention. I think there is something there for us to consider.

Mr. McDONALD. The other one is, in no circumstances do I think the results should be permitted to be divulged in civil proceedings or in proceedings involving a proprietary interest of the Government alone. It should be a more serious matter than that.

Mr. KEATING. I agree with you. You feel that in H. R. 477 there is some wording which might permit it?

Mr. McDONALD. In the section it says "or in civil proceedings." I think the application to a court is an essential to guarantee fairness and to limit the use of interceptions, and that the prosecuting official or the investigating official should not be the sole judge of tapping a wire. I think it is necessary in Federal cases that a crime either be committed or be about to be committed. Under this 477 you can tap a wire just for the purpose of an investigation, even though no crime has been committed, and you do not say that a crime is about to be committed. It is too broad. It would just give you a general right to go in in any investigation and tap a wire.

Mr. KEATING. In other words, we should spell out in the bill——

Mr. McDONALD. At line 10 on page 3, I would; that "there is reasonable cause to believe a crime has been committed or is about to be committed," and not that the communications contain information, but that evidence may be obtained concerning the commission thereof; 3552 is very similar, and there is not enough difference to discuss that. In 5149 I do not think that there are enough safeguards in the bill. It does not require any approval by the court, and it would seem to me that it is also necessary to indicate in that case that a crime had been committed or about to be committed.

With respect to 408, it is limited to criminal matters and I believe that is better. But I think again an application should be required to a court. I do think either this committee should recommend or should help assist in some way in having an interpretation of section 605, that the present act does not prohibit lawful wiretapping in the sovereign States. It has been interpreted that way by various communications companies, and it could be a declaration.

Mr. KEATING. You think we should try to cover that in this legislation?

Mr. McDONALD. Yes; I think you can in this legislation.

Mr. FOLEY. Did you consult with the FCC at all, Mr. McDonald, when you ran into that problem in the Gross case?

Mr. McDONALD. Yes; I did, and was unable to get any assistance from them.

Mr. FINE. You did not mention anything about H. R. 408?

Mr. McDONALD. I said with respect to this bill, the limitation in criminal matters is a reasonable limitation. I think the bill should require an application to the court, and the person applying for it should be at least an assistant United States attorney general.

Mr. KEATING. 408 does not require application to a court?

Mr. McDONALD. No; it does not.

Mr. KEATING. At this point in the record without objection we will insert a letter from the Federal Communications Commission dated May 28, 1953, to the chairman of this subcommittee; and a copy of a letter of June 8, 1953, from the Federal Communications Commission

to Mr. Reed of the Judiciary Committee, with an attachment indicating the Commission's views concerning H. R. 5149.

(The documents are as follows:)

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C., June 8, 1953.

Hon. CHAUNCEY W. REED,
Chairman, House Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR CONGRESSMAN REED: This is with respect to your committee's request for the Commission's comments concerning H. R. 5149, a bill to authorize the use of criminal proceedings in any court established by act of Congress of information intercepted in national security investigations.

Enclosed are copies of the Commission's comments concerning this legislation. In view of the fact that your committee has already held hearings concerning this bill and other bills dealing with similar matters, we are submitting these comments to you before receiving clearance from the Bureau of the Budget.

The Commission will be happy to furnish any further comments or information concerning this legislation which your committee may desire.

Sincerely yours,

ROSEL H. HYDE, *Chairman.*

COMMENTS OF THE FEDERAL COMMUNICATIONS COMMISSION ON H. R. 5149, A BILL TO AUTHORIZE USE IN CRIMINAL PROCEEDINGS IN ANY COURT ESTABLISHED BY ACT OF CONGRESS OF INFORMATION INTERCEPTED IN NATIONAL SECURITY INVESTIGATIONS

H. R. 5149 would permit the introduction in evidence in criminal proceedings in any court established by act of Congress of information heretofore or hereafter obtained by the Federal Bureau of Investigation by means of intercepting communications by wire or radio so long as such interceptions were made upon the express approval of the Attorney General and in the course of an investigation to detect or prevent any interference with or endangering of or any plans or attempts to interfere with or endanger the national security or defense.

The Commission has already submitted extensive comments concerning H. R. 408, H. R. 477, and H. R. 3552, bills to authorize the acquisition and interception of communications in the interest of national security and defense. Those comments indicated many of the problems which the Commission feels should be considered by Congress in enacting any legislation which would authorize the interception of communications, and those comments are, to a large extent, equally applicable to H. R. 5149. Moreover, as we previously indicated, the Commission has no special information concerning, nor do we wish to comment upon whether or not Congress should require prior authorization by a Federal judge before communications can be intercepted or whether such interception should be authorized merely upon the express approval of the Attorney General. As we also indicated previously, we have no comments to offer concerning the question of whether communications intercepted upon the express approval of the Attorney General prior to the passage of any legislation should be admissible in evidence.

H. R. 5149 concerns itself only with the admissibility in evidence in certain court proceedings of information obtained as a result of intercepting communications by the Federal Bureau of Investigation. It does not, as in the case of H. R. 408, H. R. 477, and H. R. 3552, specifically authorize the Federal Bureau of Investigation to intercept or acquire the communications or messages in question. As we indicated in our previous comments, we believe that there is some doubt as to whether, under the existing provisions of section 605 of the Communications Act, interception per se is a violation of law or whether there must be interception coupled with divulgence or use before the law is violated. If Congress determines, therefore, that such information secured by the Federal Bureau of Investigation should be admissible in evidence, it may wish to consider whether it might not be advisable to add a provision to H. R. 5149 which would specifically authorize the Federal Bureau of Investigation to intercept or acquire the communications or messages which the bill would permit to be introduced into evidence. Unless such a provision is included in this legislation, it might be construed as authorizing the introduction in Federal court proceedings of evidence illegally obtained. In this respect it is noted that the Federal rule of

evidence has been that illegally obtained evidence is not admissible in Federal court proceedings. On the other hand, many State courts have ruled that illegally obtained evidence, including evidence secured by illegal wiretapping in violation of the provisions of section 605 of the act, is admissible. In view of these facts, Congress may wish to obviate any claim that the FBI, in securing the evidence here made admissible, violated the law, by expressly authorizing the interception of communications as well as the introduction into evidence of information obtained by intercepting communications.

(Adopted June 3, 1953.)

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C., May 28, 1953.

Hon. KENNETH B. KEATING,
Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR CONGRESSMAN KEATING: During the course of my testimony before your subcommittee on May 20, 1953, concerning H. R. 408, H. R. 477, and H. R. 3552, bills to authorize the acquisition and interception of communications in the interests of national security and defense, you requested my opinion concerning an amendment to H. R. 477 proposed by the Western Union Telegraph Co. Western Union proposed that the following language be added to H. R. 477 on page 2, line 18, after the figure "1103": "and all carriers subject to this Act of 1934 are hereby authorized to permit such interception, receipt, disclosure, or utilization of the contents of any such communications by wire or radio."

It would appear that this amendment was proposed in order to insure that Western Union and other carriers subject to the Communications Act of 1934 would not be in violation of section 605 of the Communications Act if they permitted the interception or utilization of the contents of any communications by any of the officers who would be authorized by H. R. 477 to intercept or acquire such communications. It is my belief that the carriers in question would probably be fully protected without the addition of the proposed language, but I can see no objection to including the amendment if it is desired to spell out the authority of the carriers in the statute.

Sincerely yours,

ROSEL H. HYDE, *Chairman.*

Mr. KEATING. I want to express on behalf of the committee to you, Mr. McDonald, our gratitude for helping us with this problem. It is not simple, and I know your suggestions will be very valuable to us.

Mr. MCDONALD. It is a problem that confronts all law-enforcement agents, and it is a problem that today is becoming paramount.

Mr. KEATING. The committee will stand adjourned.

(Thereupon, at 12:40 p. m., the subcommittee adjourned.)

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